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A TREATISE ON THE LAW

OF

NEGOTIABLE INSTRUMENTS,

INCLUDING

BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABLE BONDS AND COUPONS; CHECKS; BANK NOTES; CERTIFICATES OF DEPOSIT; CERTIFICATES OF STOCK; BILLS OF CREDIT; BILLS OF LADING; GUARANTIES; LETTERS OF CREDIT; AND CIRCULAR NOTES,

By JOHN W. DANIEL,

OF THE LYNCHBURG (VA.) BAR.

"Out of the old fieldes,
Cometh al this new corne."—CHAUCER.

"Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit."—CICERO.

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THE PROTEST OF BILLS AND NOTES.

SECTION I.

THE NATURE AND NECESSITY OF PROTEST.

§ 926. *First, as to what instruments must or may be protested.*—When a foreign bill of exchange is presented for acceptance or payment, and acceptance or payment is refused, the holder must take what is called a protest, in order to charge the drawer or any indorser. According to the law of most foreign nations,[1] a protest is essential in the case of the dishonor of any bill; but by the custom of merchants in England,[2] and wherever the law merchant prevails in the United States, the protest is only necessary in the case of foreign bills;[3] though by statute in most of the States inland bills and promissory notes may be protested in like manner.[4] So indispensable is the protest of a foreign bill in

[1] Thomson on Bills (Wilson's ed.) 307.

[2] Orr v. Maginnis, 7 East, 359; Gale v. Walsh, 5 T. R. 239; Borough v. Perkins, 1 Salk. 131; Chitty on Bills (13th Am. ed.) [*332], 372; Byles (Sharswood's ed.) [*249], 394.

[3] Burke v. McKay, 2 How. 66; Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, 6 Wheat. 372; Bailey v. Dozier, 6 How. 23; Bank U. S. v. Leathers, 10 B. Mon. 64; Hubbard v. Troy, 2 Ired. 134; McMarchey v. Robinson, 10 Ohio St. 496; Smith v. Curlee, 59 Ill. 221; Green v. Louthain, 49 Ind. 139.

[4] See Virginia Code of 1873, chap. 141, p. 987, §§ 7, 8, wherein it is provided:

case of its dishonor, that no other evidence will supply the place of it, and no part of the facts requisite to the protest can be proved by extraneous testimony,[1] and it has been said, that it is a part of the constitution of a foreign bill.[2] But, while the practice is usually followed to protest inland bills and notes, under the permissive statutes, it is not a practice which makes it incumbent to protest them; and the holder may waive the privilege if he choose to do so, and produce other evidence of dishonor.[3]

§ 927. The requisition of a protest in the case of foreign bills was in order to afford authentic and satisfactory evidence of due dishonor to the drawer, who, from his residence abroad, would experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representations of the holder. "It also," observes a distinguished author, "furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign courts give credit to the acts of a public functionary in the same manner as a protest under the seal of a foreign notary is evidence in our courts of the dishonor of a bill payable abroad."[4] Such was the convenience of evidence in this form, obviating the necessity of the attendance of witnesses, and preserving their testimony where otherwise it might be lost by death or removal, that it became common to protest inland bills, and

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· § 7. Every promissory note, or check for money payable in this State, at a particular bank, or at a particular office thereof, for discount or deposit, or at the place of business of a savings institution or savings bank, or at the place of business of a licensed broker, and every inland bill of exchange, payable in this State, shall be deemed negotiable, and may upon being dishonored for non-acceptance or non-payment, be protested, and the protest be in such case evidence of dishonor, in like manner as in the case of a foreign bill of exchange.

"§ 8. The protest, both in the case of a foreign bill and in the other cases mentioned in the preceding section, shall be *prima facie* evidence of what is stated therein, or at the foot, or on the back thereof, in relation to presentment, dishonor and notice thereof."

[1] Union Bank v. Hyde, 6 Wheat. 572; Carter v. Union Bank, 7 Humph. 548.

[2] Borough v. Perkins, 1 Salk. 121; 2 Ld. Raym. 992; Chitty on Bills (13th Am. ed.) [*333], 373; Edwards on Bills, 581.

[3] Bailey v. Dozier, 6 How. 23; Wanger v. Tupper, 8 How. 234; 2 Rob. Prac. (new ed.) 121.

[4] Byles on Bills (Sharswood's ed) [*249], 395.

promissory notes as well; and the holder was often disappointed in finding that such protest was not evidence of dishonor.[1] This led to a very general enactment of statutes authorizing protests in such cases; and giving them the like effect as in cases of foreign bills.

The law merchant requires a protest and notice only in cases of bills negotiable by the custom of merchants. Bills payable "in currency," or any other medium than legal money, are not of this character, and therefore no protest is necessary, nor is it, unless by statute, evidence of any fact therein stated.[2]

§ 928. *Foreign promissory notes.*—In the case of promissory notes executed in one State or country, and payable in another, no notice, of course, is necessary to charge the maker; and if there be no indorser there can be no analogy between the note and a bill. But as soon as a promissory note is indorsed it becomes closely assimilated to a bill, the maker being primarily liable, like the acceptor, and the indorser secondarily, like the drawer. It is often said that every indorser is a new drawer, and in fact the indorser's obligation is precisely like that of the drawer on an accepted bill. Therefore, when an indorsed note is payable in a State or country different from the one where it is drawn—perhaps more especially when the indorser is not of the State or country where it is payable, though no distinguishing difference, it seems to us, exists—almost every consideration of convenience which would make a protest necessary and competent evidence of presentment and notice, in case of a foreign bill, would recognize it as equally competent in respect to the indorser of the note. It has been well said that "the similarity between the indorsement of notes, and the drawing and indorsement of bills of exchange is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a dif-

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[1] 2 Rob. Prac. (new ed.) 181.

[2] Bank of Mobile v. Brown, 42 Ala. 108; Ford v. Mitchell, 15 Wis. 304.

ferent character of evidence to prove the same facts with regard to two instruments, which, though different in some respects as to their phraseology, are so essentially similar in their nature and operations."[1] And there are well considered cases sustaining it.[2] This view has been taken in Kentucky, respecting an indorsed certificate of deposit.[3]

There are cases in which the converse view has been taken, it being considered that the certificate of protest of a promissory note is a document unknown to the law; and although the note be payable in a foreign place, is inadmissible;[4] and although the argument *ab inconveniente* is strong against this rejection of such testimony, in strict law, it seems to us, it must be excluded. A general usage would probably be controlling.[5]

§ 929. *As to the meaning of protest*, it includes, in a popular sense, all the steps taken to fix the liability of a drawer or indorser, upon the dishonor of commercial paper to which he is a party.[6] More accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the non-acceptance, or even non-payment, as the case may be, of the bill in question; and a calling of the notary to witness that due steps have been taken to prevent it.[7] The word "protest" signifies to testify before; and the testimony before the notary that proper steps were taken to fix the drawer's liability is the substance, and the certificate of the notary the formal evidence, to which the term protest is legally applicable.

§ 930. *In what cases necessary.*—According to the English law, the protest must be made in the case of dishonor by non-acceptance as well as dishonor by non-payment. And the

[1] Parker, C. J., Williams v. Putnam, 14 N. H. 540; Carter v. Burley, 9 N. H. 558; Smith v. Little, 10 N. H. 526; Edwards on Bills, 584.

[2] Ticonic Bank v. Stackpole, 41 Me. 302, held admissible at common law.

[3] Piner v. Clary, 17 B. Mon. 645. [4] Kirtland v. Wanzer, 2 Duer, 278.

[5] See Burke v. McKay, 2 How. 66.

[6] Townsend v. Lorain Bank, 2 Ohio St. 345; Coddington v. Davis, 1 Comst. 186.

[7] Walker v. Turner, 2 Grat. 536; Chitty (13th Am. ed.) [*458], 516; Swayne v. Britton, 17 Kansas, 629.

same rule prevails in the United States,[1] although it was decided by the Supreme Court of the United States, in an action on a protest for non-payment of a foreign bill, that a protest for, or notice of, non-acceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this country.[2] But the English rule has been deemed the most consistent with commercial policy by the highest authorities, and Story and Kent adopt it as the true one; the former observing that the decisions of the Supreme Court, if they would now be held law by that court, would be so held only upon the ground of the local law of Pennsylvania (to which State the decisions appertained), as to bills drawn or payable there.[3]

§ 931. *As to what constitutes a refusal to honor a bill*, which will authorize or require a protest, a distinction exists between the dishonor for non-acceptance and dishonor for non-payment. If the drawee accepts the bill, he is bound to provide for its payment at maturity; and if the holder present it at his home or place of business at maturity, and finds that he has absented himself, and left no one with funds to meet it, such conduct is in itself a refusal to pay, and the bill may be at once protested (and, if foreign, must be), and notice given. But absence from home or place of business, without leaving any one to accept a bill, is not a refusal to accept, for the drawee may not be aware that the bill is drawn, and is not bound (in the absence of a promise to accept) to be prepared for its presentment.[4]

§ 932. There is no difference in respect to the necessity for protest whether the bill be payable at a certain time after

[1] Thompson v. Cumming, 2 Leigh, 321; Mason v. Franklin, 3 Johns. 202; Watson v. Loring, 3 Mass. 557; Phillips v. McCurdy, 1 Har. & J. 187; Sterry v. Robinson, 1 Day, 11; Winthrop v. Pepoon, 1 Bay, 468; Allen v. Merchants' Bank, 22 Wend. 215.

[2] Brown v. Barry, 3 Dallas, 365; Clarke v. Russell, 3 Dallas, 295, followed in Pennsylvania, in Read v. Adams, 6 Sergt. & R. 358.

[3] 3 Kent Com. 95; Story on Bills, § 273, note; Edwards on Bills, 448; Chitty on Bills (13th Am. ed.), [*332], 372.

[4] Bank of Washington v. Triplett, 1 Pet. 35. See *ante*, § 589 vol. I.

date or after sight, for, although it is not necessary to present a bill payable at a certain time after date until its maturity, yet, if such a bill be presented for acceptance and dishonored, it is necessary to make protest and give notice, in order to charge drawer or indorsers.[1] But if a bill has been protested for non-acceptance, and its dishonor duly notified, it is not necessary to present it again for payment, and protest it separately for non-payment, or to give separate notice of non-payment.[2]

§ 933. *Notarial charges.*—It is considered by high authority that notarial charges are not a legal charge except where the protest is required by the law merchant, although it is certainly usual to pay them where they are reasonable, and made in good faith, and in conformity with usage.[3] It being an entirely unnecessary act to protest an inland bill or a note in order to charge the drawer or an indorser, and purely voluntary and for his own convenience on the part of the holder, there is obvious force in this suggestion. But it is, doubtless, in almost every case the cheapest, easiest and safest way of proving notice. The defendant would be chargeable with costs of other testimony more cumbrous and more expensive, where liable, and custom has so extensively sanctioned the practice, that we anticipate the courts will be slow to hold that it is not a legitimate charge, in cases where there is a drawer or indorser to charge by notice.[4] But where there is no drawer or indorser to charge, the protest would be useless, and notarial fees could not be recovered,[5] unless, indeed, the protest were authorized by statute, in which case a different rule might perhaps be applicable.

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[1] Bank of Washington v. Triplett, 1 Pet. 25; U. S. v. Barker, 4 Wash. C. C. 464; O'Keefe v. Dunn, 6 Taunt. 305; s. c. 5 Maule & Sel. 282.

[2] De la Torre v. Barclay, 1 Stark, part 2, 7; Thomson on Bills (Wilson's ed.), 308.

[3] 1 Parsons N. & B. 646; Johnson v. Bank of Fulton, 29 Ga. 260.

[4] Merritt v. Benton, 10 Wend. 117.

[5] German v. Ritchie, 9 Kans. 110; Noyes v. White, Id. 640.

SECTION II.

BY WHOM AND WHERE PROTEST SHOULD BE MADE.

§ 934. *By whom the protest should be made.*—As to the person by whom the protest should be made, it is necessary, as a general rule, that it should be made by a notary public in person. The notary is a public officer, commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as in his own.[1] But when no notary can be conveniently found, the protest may be made by any respectable private person of the place where the bill is dishonored.[2]

In England, it is required by statute that, in case of inland bills, the protest by a private person shall be made in the presence of two or more credible witnesses.[3] And it has been said that when a private person protests a bill, it should be done in the presence of two witnesses.[4] Certainly it is sufficient if it be so made,[5] but it does not appear to be necessary to require witnesses to the protest of a foreign bill by a private person.[6] The notary to whom the bill or note is given for protest is bound to follow the instructions given him, and it is not his duty to determine whether or not it should be protested on a certain day. If he follows instructions he is not liable to any person for any irregularity in his course.[7]

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[1] See Chapter XX, on Presentment for Payment, Sec. I, vol. I, §§ 579, 587.

[2] Burke v. McKay, 2 How. 66; Read v. Bank of Kentucky, 1 T. B. Mon. 91.

[3] 9 & 10 William III, ch. 17.

[4] Bayley on Bills (5th ed.), 258. No authority is referred to; and "*Quære*, if not confined to inland bills," say the editors of Chitty. Chitty on Bills [*333], 374, note *u*. In Todd v. Neal's adm'r, 49 Ala. 273, it is said by Peters, J.: "If there be no legal notary there, on demand and refusal of payment, it is sufficient if the protest be made out and drawn up by a respectable inhabitant of the place where the bill is payable, in the presence of two witnesses."

[5] Story on Bills, § 276; 1 Pars. N. & B. 633; Byles (Sharswood's ed.), [*249], 395.

[6] Brooks Notary, 103; Chitty on Bills (13th Am. ed.), [*333], 374, note *u*.

[7] Commercial Bank v. Varnum, 14 N. Y. S. C. (7 Hun), 236; s. c. 49 N. Y. 269.

§ 935. *Where the protest should be made.*—As to the place of protest it is usually made at the place where the dishonor occurs.[1] When the protest is for non-acceptance, the place of protest should be the place where the bill is presented for acceptance.[2] But when the bill is drawn upon the drawees in one place, and is payable in another, the question has arisen, whether the protest should be at the place of acceptance or place of payment. Mr. Chitty says, in respect to protest for non-payment, that "if a bill be drawn abroad, directed to the drawee at Southampton or any other place, requesting him to pay the bill in London, the protest for non-acceptance may be made either at Southampton or in London.[3] But as the presentment for acceptance must be at the former place, it would be better to make the protest for non-acceptance there also.[4] It has been held that it is sufficient if the protest for non-payment, where there has been a refusal to accept, be made at the place of the drawee's residence;[5] and in England, it being conceived that the decision

[1] Byles (Sharswood's ed.), [*250], 396.

[2] Story on Bills, § 282.

[3] Chitty on Bills (13th Am. ed.), [*334], 374.

[4] Thomson on Bills, 308; Mar. 107, 108.

[5] Mitchell v. Baring, 4 Car. & P. 35; 10 Barn. & C. 8 (19 E. C. L. R. 261). The Code of Virginia, ch. 144, § 2, provides as follows: "If a bill of exchange, wherein the drawer shall have expressed that it is to be payable in any place other that by him mentioned therein to be the residence of the drawee, shall not, on the presentment thereof for acceptance, be accepted, such bill may, without further presentment to the drawee, be protested for non-payment in the place in which it shall have been by the drawer expressed to be payable, unless the amount thereof be paid to the holder on the day on which the bill would have become payable had it been duly accepted." This section was first incorporated in the Code of 1849, upon recommendation of the revisors, who said in their report to the General Assembly: "It is a general rule of law that the protest for non-payment is to be at the place where the drawee resides. In Mitchell, &c., v. Baring, &c., 4 Car. & P. 35; 19 Eng. Com. Law. Rep. 261; 10 Barn. & Cress. 4; 21 Eng. Law. Com. Rep. 12, the drawer of a bill made in America had expressed that it was to be payable in London, yet Liverpool was mentioned therein as the residence of the drawee; on the presentment thereof for acceptance, it was not accepted, and the protest for non-payment was at Liverpool. Under particular circumstances appearing in the case, this protest was held sufficient; the general question whether, if the acceptance had been in the usual form, a protest in London would have been sufficient, was left undecided. It appeared from the evidence of several witnesses, some of them notaries and others merchants, that,

cast a doubt upon the legality of making protest at the place specified for payment, the statute 2 and 3 William IV, c. 98, was enacted, declaring that a protest at the place of payment in case of a refusal to accept, without further presentment to the drawee, should be sufficient. It is conceived that this statute was merely declaratory of the common law. Where there has been an acceptance by the drawee in one place, to pay in another, the latter would seem to be clearly the place at which the protest should be made.[1]

§ 936. As to the law controlling the protest, it should be made according to the law of the place of presentment for acceptance, if it be for non-acceptance, or of the law of the place where the bill is payable, if it be for non-payment; in other words, according to the law of the place where the dishonor occurs.[2]

SECTION III.

FORMAL MAKING, PREPARATION AND AUTHENTICATION OF PROTEST.

§ 937. As to the formality of making protest, and preparing the certificate thereof, it generally comprises three distinct steps: 1. Making the presentment, and demand of payment; 2, Noting the dishonor; and, 3, Extending the protest.

§ 938. (1) *The presentment and demand of payment.*— The first step taken is the presentment of the instrument to the drawee, or acceptor or maker, by the notary, and a

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where a foreign bill, drawn upon a merchant residing at Liverpool, payable in London, was refused acceptance by the drawee, the usage was to protest it for non-payment in London. Yet, though this was the usage, the doubt arose after the decision in Mitchell, &c., v. Baring, &c., whether such usage would be sustained by the courts, and the statute of 2 and 3 Will. IV, ch. 98, was passed to remove the doubt. We propose, it will be perceived, to adopt the same statute in Virginia." Report of Revisors, p. 719. See *ante*, § 651, vol. I.

[1] Story on Bills, § 284; Thomson (Wilson's ed.), 309.

[2] Shanklin v. Cooper, 8 Blackf. 41; Turner v. Rogers, 8 Ind. 139; Carter v. Union Bank, 7 Humph. 548; Onondaga County Bank v. Bates, 3 Hill, 53; Rothschild v. Currie, 1 Q. B. 43. See Chapter XXVII, vol. I, Section IX.

demand of payment. By the law merchant it is absolutely necessary that the notary himself should make this formal presentment and demand. And, although the holder may have already presented the bill and demanded acceptance or payment, and been refused, it is still necessary that the presentment and demand, which are to be made the basis of the notary's certificate, should be made by him in person. For otherwise his testimony contained in the protest would be hearsay and secondary, and would lack the very element of certainty which the protest is especially designed to assure. Not even his clerk, nor, unless authorized by law, his deputy, can perform these functions for the notary, as it is to his official character that the law imputes the solemnity and sanction which are accorded his certificate. The authorities on this subject are collated in the chapter on "Presentment for Payment," in the first volume of this work.[1]

§ 939. (2) *Noting the dishonor.*—As soon as the presentment and demand have been made, or at some seasonable hour during the same day, the notary makes a minute on the bill, or in his book of registry, consisting of his initials, the month, the day, the year, the refusal of acceptance or payment, and his charges of protest. This is the preliminary step toward the protest, which may be afterward written out in full—extended, as the elaboration of these minutes is termed—and it is called noting. "Noting," it was said in an early case, "is unknown to the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years."[2] But it is now quite well established in England, Scotland and the United States, that the noting is a kind of "initial protest," as Thomson aptly terms it, not self sufficient as a protest, but sufficient in the meantime, if the certificate of protest is regularly extended afterward.[3] It must be made on the very day of dishonor

[1] Chapter XX, section I, §§ 579, 587.

[2] Leftly v. Mills, 4 T. R. 170, Buller, J.

[3] Chaters v. Bell, 4 Esp. 48; Geralopulo v. Wieler, 10 C. B. 690; 3 Eng. L. & Eq. 515; Edwards on Bills, 581; Thomson on Bills (Wilson's ed.), 311; Story on Bills (Bennett's ed.), 27, note 6.

by non-acceptance or non-payment, otherwise it cannot be made the basis of the extended protest.[1] For the notary will not be permitted to trust to his memory for the requisite particulars. It is to his contemporaneous written statement that the law gives credit.[2] Where, in Scotland, the original protest could not be used, because not properly stamped, it was allowed to be used as a note for extending a valid protest,[3] and it seems unimportant in what particular form the noting is done.

§ 940. (3) *Extending the protest.*—The extension of the protest is the completion of the instrument of protest, from minutes or "initial protest," as they are called, noted down on the day of dishonor. This extension may be made at any time. As said by Lord Kenyon: "If the bill was regularly presented, and noted at the time, the protest might be made at any future period," [4] and it is well settled to this effect in the United States.[5] The extension may be made even after suit brought,[6] or after trial has commenced, and when made, it is antedated, as of the day when the initial protest was made.[7]

In Scotland, the extension of a protest was permitted fifteen years after noting.[8]

§ 941. *In cases of payment, supra protest.*—It has been contended that in the case of payment for honor, which must be made *supra protest*, the formal extension of the protest must be made before the payment, on the ground that unless this were done, the allegation that the bill was continued and paid under protest would not be proved, inasmuch as the protest should be understood to mean such protest as

[1] Buller N. P. 373; Thomson on Bills (Wilson's ed.), 315.

[2] Thomson on Bills, 312. [3] Ibid.

[4] Chaters v. Bell, 4 Esp. 48 (1801); Geralopulo v. Wieler, 10 C. B. 690; 3 Eng. L. & Eq. 515; Robins v. Gibson, 1 Maule & S. 288.

[5] Bailey v. Dozier, 6 How. 23; Bank of Decatur v. Hodges, 9 Ala. 631; Cayuga Co. Bank v. Hunt, 2 Hill, 635.

[6] Dennistoun v. Stewart, 19 How. 606; Brooks Notary, 97.

[7] Orr v. Maginnis, 7 East, 361; Byles (Sharswood's ed.) [*250], 396.

[8] Alexander v. Scott, Thomson on Bills, 312.

would give a right of action to the person paying for honor. But this distinction is not recognized. It is true that the declaration that the payment was made for honor must precede the protest, and that the noting of such declaration and of the dishonor must be then made, and that unless the declaration were then made, no after act could give to the payment the character of payment *supra protest*.[1] But the protest in this, as in other cases, may be extended at any time, provided it was duly noted.[2]

§ 942. When there is a protest for non-acceptance, and subsequently a protest for non-payment, it is not sufficient to simply note the bill for non-acceptance, and extend only the protest for non-payment, but wherever proof of protest is requisite, the extended protest alone will suffice.[3]

§ 943. *Copy of protest, and of instrument protested.*—If the drawer reside abroad, it has been said that a copy, or some memorial of the protest, should accompany the notice of dishonor.[4] But it is now well settled, that it is only necessary for the drawer or indorser to receive a notice of the protest, without any copy or memorial of the instrument itself, in order to fix his liability, the protest not being necessary until the trial.[5]

§ 944. It is usual, and highly important, to prefix a copy of the bill or note, with all indorsements thereon, *verbatim et literatim*, to the instrument of protest, for the purpose of identifying the bill or note with certainty, and indicating to the drawer or indorsers what party is entitled to payment.[6]

§ 945. *How the protest is authenticated or proved.*— The official seal of a notary attached to the certificate of protest

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[1] Vanderwall v. Tyrrell, 1 Mood. & Malk. 87.

[2] Geralopulo v. Wieler, 10 C. B. 690; 3 Eng. L. & Eq. 515.

[3] Rogers v. Stephens, 2 T. R. 713; Orr v. Maginnis, 7 East, 359.

[4] Byles (Sharswood's ed.) [*252], 399.

[5] Goodman v. Harvey, 4 Ad. & El. 870 (31 E. C. L. R.); Robins v. Gibson, 1 Maule & S. 288; Cromwell v. Hyson, 2 Esp. 511; Dennistoun v. Stewart, 17 How. 606; Lenox v. Leverett, 10 Mass. 1; Wells v. Whitehead, 15 Wend. 527; Wallace v. Agry, 4 Mason, 336; Chitty on Bills (13th Am. ed.) [*344], 375.

[6] Story on Bills, § 276; Chitty (13th Am. ed.) [*458], 517.

is everywhere received as a sufficient *prima facie* proof of its authenticity. The courts take judicial notice of the seal, and it proves itself by its appearance upon the certificate.[1] But it may be controverted as false, fictitious or improperly annexed.[2]

§ 946. It is not always essential to the admissibility in evidence of the certificate of protest that it should be under the notary's seal; nor is it essential in all cases, as already seen, that it should be made by the notary in person; but in either of these cases it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating, and is sufficient without a seal, according to the laws of the country where it was made.[3] In some cases it has been held that a notary's certificate of protest is sufficient without a seal, the law giving full evidence to his protestations and attestations;[4] while other authorities hold that by the law merchant the notary's seal is an essential part of the certificate protest, and that without such seal the certificate is insufficient as proofs of protest.[5]

§ 947. An impression of the notarial seal on the paper of the protest is *prima facie* sufficient, and it will be presumed to have been affixed according to the laws of the country where the dishonor occurred until there is something to impeach it.[6] But it seems that a mere scrawl would not be.[7]

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[1] Nichols v. Webb, 8 Wheat. 326; Townsley v. Sumrall, 2 Pet. 170; Dickens v. Beal, 10 Pet. 582; Mullen v. Morris, 2 Barr, 86; Nelson v. Fotterall, 7 Leigh, 180; Carter v. Burley, 9 N. H. 558; Bryden v. Taylor, 2 Har. & J. 399; Bank of Ky. v. Pursley, 37 B. Monroe, 240.

[2] Ibid.

[3] Carter v. Burley, 9 N. H. 558; Chanoine v. Fowler, 3 Wend. 173.

[4] Bank of Ky. v. Pursley, 3 T. B. Monroe, 240 (1826); Huffuker v. National Bank, 12 Bush. (Ky.) 293 (1876), Lindsay, C. J., saying: "The notary being an officer of this State, his official signature is all that is required to the protest." Lambeth v. Caldwell, 1 Rob. La. 61.

[5] Donegan v. Wood, 49 Ala. 251–2. See 2 Pars. N. & B. 634; Story on Bills, § 277; Kirksey v. Bates, 7 Porter (Ala.) 529.

[6] Carter v. Burley, 9 N. H. 558; Conolly v. Goodwin, 5 Cal. 220; Bank of Manchester v. Slason, 13 Vt. 334.

[7] Carter v. Burley, 9 N. H. 558. See Donegan v. Wood, 49 Ala. 251.

§ 948. It is well settled that where the laws of the State in which the protest is made require that it shall be made under the notary's seal, it will not be received in evidence in another State without such seal, and no other mode of authentication is available.[1]

§ 949. The protest should be signed by the notary; but if his act, in fact it may be signed by his clerk in his name, or may be in printing, it being requisite only that it should be by his authority.[2]

SECTION IV.

CONTENTS OF PROTEST.

§ 950. The protest, or, more strictly speaking, the notarial certificate thereof, should set forth: (1) The time of presentment; (2) the place of presentment; (3) the fact and manner of presentment; (4) the demand of payment; (5) the fact of dishonor; (6) the name of the party by whom presentment was made; and (7) the name of the person to whom presentment was made. And in respect to notice, it should state: (1) The person notified; (2) the manner of notification; and (3) when not served on the party in person, it should specify distinctly whether it was delivered at his house or place of business; or, if sent by mail, that it was addressed to the post-office nearest to him, or at which he usually received his business letters. These, at least, are the elements of a regular and perfect protest. The admissibility of the protest as evidence of notice, and its statements in reference to notice, are considered under a separate head.

§ 951. *As to the time.*—It is essential that the time of presentment and demand should be stated, for otherwise it cannot appear from the certificate that the bill was duly dishonored. And if it state that the bill was "this day pro-

[1] Ticknor v. Roberts, 11 La. 14; Bank of Rochester v. Gray, 2 Hill (N. Y.) 227; Wharton's Conflict of Laws, § 699 a.

[2] Fulton v. McCracken, 18 Md. 528.

tested," and is dated on a day previous to, or after, the day of maturity, it is invalid upon its face.[1]

It is better to state that the presentment and demand were made during the usual hours of business, but where the hour of the day is not stated, it will be presumed that they were made at the proper time of day.[2]

§ 952. *As to the place.*—If the bill is not payable at a particular place, it is not absolutely necessary to state at what place the presentment and demand were made; but if it were payable at a bank, or other specified place, the certificate is insufficient unless it state presentment and demand at such place.[3]

§ 953. *As to the manner and fact of presentment and demand.*—The presentment of the bill and the demand of payment should be separately stated. The usual expression of the certificate is, that the notary "did exhibit said bill," and it is certain that there must be some expression importing *ex vi termini* that the bill was presented to the drawee or acceptor.[4] The mere statement that payment was "demanded" has been held by the United States Supreme Court to be insufficient in itself, because not necessarily implying a "presentment also."[5] But there can be no legal demand without presentment, and the term "demanded" has been considered sufficient in Louisiana.[6] The mere statement of "presentment" is not in itself sufficient without also a statement of demand.[7]

§ 954. *As to the fact of dishonor.*—The dishonor of the bill must be stated, and it is usually expressed in the phrase

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[1] Walmsley v. Acton, 44 Barb. 312; see *post*, § 984.

[2] Burbank v. Beach, 15 Barb. 326; DeWolf v. Murray, 2 Sand. 166; Cayuga County Bank v. Hunt, 2 Hill. 227.

[3] People's Bank v. Brooke, 31 Md. 7.

[4] Union Bank v. Fowlkes, 2 Sneed. 555; Bank of Vergennes v. Cameron, 7 Barb. 143.

[5] Musson v. Lake, 4 How. 262, Woodbury and McLean, JJ., dissenting on this point.

[6] Nott v. Beard, 16 La. 308.

[7] Nave v. Richardson, 36 Mo. 130; Farmers' Bank v. Allen, 18 Md. 475.

that the person to whom it was presented "answered that it would not be accepted, or paid," or that such person "refused to accept or pay it," or some such language. If it does not, in some terms, inform the party of the dishonor, it is fatally defective.[1] But it is not material what words are used. If it states that the reason of protest was its non-payment, it is sufficient.[2]

§ 955. *As to the name of the person* upon whom demand was made, it should be stated, especially when it was not made at the place of business of the drawer or acceptor. In the latter case, it is sufficient to describe the person as a clerk, or person in charge.[3] If a firm were the drawer or acceptor, it would be fatally defective in not stating the name of the person on whom demand was made, as well as that he was a member of the firm.[4]

If the bill is payable at a bank, nothing more need be stated than that the notary presented it and demanded payment at the bank, and that it was refused, without stating the name of the person or officer of the bank to whom it was presented.[5]

§ 956. The certificate frequently states the name of the party who requests the protest to be made, and who looks to the drawer or indorser for payment; but this is not necessary.[6]

§ 957. It is said to be important that the reasons given by the drawee for non-acceptance or non-payment should be stated in the certificate of protest;[7] and it may be usual to do so. But the reasons for a refusal to accept or pay, while they may sometimes be of such a character as to excuse protest or notice, as against the drawer, are not an essential

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[1] Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Arnold v. Kinloch, 50 Barb. (N. Y.) 44; Littledale v. Maberry, 43 Me. 264.

[2] Young v. Bennett, 7 Bush (Ky.) 477.

[3] Nelson v. Fotterall, 7 Leigh, 179; Stainback v. Bank of Va. 11 Grat. 260.

[4] Otsego County Bank v. Warren, 18 Barb. 290.

[5] Hildeburn v. Turner, 6 How. 69. [6] Duckert v. Van Lilienthal, 11 Wis. 56.

[7] Chitty on Bills (13th Am. ed.) [*458], 516, 517; Story on Bills, § 276,

part of the protest, and it makes no difference if they are not stated.

§ 958. No mere verbal inaccuracy or mistake in the certificate of protest will vitiate it, if in fact the protest was properly made and the notice given. Thus, a misdescription of the acceptor as "Chas." instead of "And. E. Byrne," was held not fatal to the protest;[1] and so a misstatement of the date.[2]

SECTION V.

THE PROTEST AS EVIDENCE.

§ 959. The original instrument of protest, or a duly authenticated copy, is respected by the courts of a foreign country, and whenever admissible in testimony is regarded as *prima facie* evidence of all the facts therein stated, so far as they come within the scope of the notary's duty in making the presentment and demand and protest.[3] But it is *prima facie* evidence only, and any statement made in the protest may be rebutted by any competent testimony to the contrary.[4]

Although the notary, when examined, has no recollection of the facts stated in the certificate of protest, it is still *prima facie* evidence until contradicted.[5]

But as, by the law merchant, the protest is only necessary, or receivable as evidence of dishonor, in the case of foreign bills, or of indorsed notes, which are of the nature of foreign bills and come within the reason of the law respecting them, the protest of an inland bill or of an inland promissory note is not evidence of dishonor in a foreign State, although it may be in the State where the dishonor occurred

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[1] Dennistoun v. Stewart, 17 How. 606.

[2] Bank at Decatur v. Hodges, 9 Ala. 631.

[3] Townsley v. Sumrall, 2 Pet. 170; Chase v. Taylor, 4 Har. & J. 54.

[4] Dickens v. Beal, 10 Pet. 582; Ricketts v. Pendleton, 14 Md. 320; Union Bank v. Fowlkes, 2 Sneed, 555; Nelson v. Fotterall, 7 Leigh, 180.

[5] Sherer v. Easton Bank, 33 Penn. St. 134.

by statute.[1] And where a State statute makes the protest, when executed by a notary of that State, evidence as to demand and notice, it does not authorize the notary to act beyond its territorial limits, or accord the same effect to his act when beyond them.[2]

§ 960. *By the law merchant protest not evidence as to notice.*—When the notary who has in charge the bill for presentment has presented it for acceptance or payment, as the case may be, and has protested it in the event of its dishonor by a refusal, his official duty is fulfilled; and it is not incumbent on him to go farther and give notice.[3] Although, if the holder desires him to do so, he may, as well as a private person, act as his agent in giving notice.[4] It being no part of the notary's official duty to give notice, which is entirely distinct from the protest, the certificate of protest made out by the notary is not by the law merchant evidence of any fact stated therein respecting the service or transmission of notice, but only of such things as pertain to his official duty in respect to the protest.[5] By statute, however, it is very generally provided that the certificate of protest shall be evidence of the facts stated therein respecting notice, it being found by experience to be a more convenient method, and as reliable as any other of making the proof. Prof. Parsons expresses the opinion that without the aid of a statute, the certificate is evidence "not only of presentment, demand and dishonor, but of such notice as it asserts to have been given."[6]

§ 961. *How notice proved.*—The notice must be proved by the notary himself when he gives it, or by other witnesses

[1] Dutchess Co. Bank v. Ibbottson, 5 Den. 110; see Kirtland v. Wanzer, 2 Duer, 278, on this point. But see *supra* as to other points in which it is not approved.

[2] Dutchess Co. Bank v. Ibbottson, 5 Den. 110.

[3] Dickens v. Beal, 10 Pet. 582; Morgan v. Van Ingen, 2 Johns. 204; Miller v. Hackley, 5 Johns. 384; Bank of Rochester v. Gray, 2 Hill, 231.

[4] See Chapter XX, on Presentment for Payment, Sec. I, vol. 1, § 572.

[5] Dickens v. Beal, 10 Pet. 582; Walker v. Turner, 2 Grat. 536; Williams v. Putnam, 14 N. H. 540; Rives v. Parmley, 18 Ala. 256; Couch v. Sherrill, 17 Kansas, 624; Swayze v. Britton, 17 Kansas, 625. See *post*, § 991.

[6] 2 Parsons N. & B. 498; Bank of Rochester v. Gray, 2 Hill, 231; disapproving Cape Fear Bank v. Steinmetz, 1 Hill, 45.

in depositions duly taken as in any other case, or by examination *ore tenus*, at the trial.[1] The certificate of protest is in no sense, unless by statutory enactment, a certificate of notice, nor is a certificate of the notary subjoined to the protest, nor a separate affidavit of the notary admissible to prove the fact, it not being a legal form of testimony.[2] When the notary undertakes to act as agent of the holder, the engagement does not inure to the benefit of any one but his principal, and therefore where the notary had engaged to give notice to the first and second indorsers, but only gave it to the second, of whom the holder received the amount of the bill. the second indorser who paid it could not sue him for not giving notice to the first.[3]

§ 962. *Protest only evidence of facts stated.*—It cannot be inferred from the mere fact of protest, when it is admissible as evidence of the manner and service of notice, or of the facts stated respecting the giving of notice, that any step was regularly taken, or any fact existed, which is not certified to. In other words, the admission of the certificate of protest as evidence, only makes it evidence of such things as it distinctly states, and purports to give evidence of.

Therefore, where the certificate of protest is by statute admissible evidence of the facts stated as to notice, and it simply states that notice was addressed to the indorser at a certain place, without adding that such place was the post-office or residence of the indorser, there can be no inference that such was the fact, and the certificate is consequently insufficient in itself to prove due notice.[4] Such at least is the

[1] Dickens v. Beal, 10 Pet. 582; Miller v. Hackley, 5 Johns. 384; Lloyd v. McGair, 3 Barr. 482. See *post*, § 967.

[2] Walker v. Turner, 2 Grat. 536; Bank of Vergennes v. Cameron, 7 Barb. 144.

[3] Morgan v. Van Ingen, 2 Johns. 204.

[4] Bradshaw v. Hedge, 10 Iowa, 402 (1860); Sprague v. Tyson, 44 Ala. 340 (1870). In Turner v. Rogers, 8 Ind. 140 (1856), the certificate stated that, "I notified Henry Turner and John H. Woodfill by letter to each at New Albany, Indiana, per mail the same day." The parties named were indorsers. The Court said, there was "no evidence that the defendant resided at New Albany or anywhere else. The notary's statement in the protest that he notified the indorsers

view which has been taken in the cases cited in the subjoined note, and which seems to us consistent with reason and with the strict principles of the law merchant, which throws the burden of proving due notice on the plaintiff. But the Supreme Court of the United States, it seems, takes a different view, though this precise question was not before it. The question in the case before it arose upon a demurrer to evidence, the notary who made the certificate being examined as a witness, and testifying that he sent notice by mail addressed to the indorser at Alexandria, without any evidence that that was his place of residence; and the court held that the jury would have been warranted to infer that the indorser's residence was in Alexandria.[1] In Virginia this case

is qualified by specifying the manner in which it was done—that is by addressing notices to them at New Albany. The bill was drawn, indorsed and payable in Ohio. There is no presumption that they resided in New Albany." To same effect see also Sullivan v. Deadman, 19 Ark. 486. The case of Raine v. Rice, 2 Patton & H. 530 (1857) is often quoted for the same doctrine. The syllabus of the reporter is misleading, and no such question was decided, as is shown in Linkous v. Hale, 27 Grat. 674 (1876).

[1] Bank of U. S. v. Smith, 11 Wheat. 171 (1826). In this case it appeared that the notary who protested the note in Washington swore on the trial, being examined as a witness, that on the day of dishonor he put in the post-office notice of non-payment, addressed to the defendant at Alexandria. This was the only evidence of due notice, and the defendant demurred to the evidence on the ground that it did not appear that Alexandria was the post-office to which notice should have been sent. Thompson, J., said, rendering the unanimous opinion of the Court: "If the defendant's place of residence was Alexandria, it is not denied that but due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view in demanding payment of the maker. And, it is fair, also, to presume that he made inquiry for the residence of the defendant before he addressed a letter to him; for it is absurd to suppose he would direct to him at that place, without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer from this evidence that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point one way or the other, if the least intimation had been given of the objection. It was manifestly taken for granted by all parties that the defendant lived at Alexandria. And if a party will upon the trial remain silent, and not suggest an in-

was recently cited with approval by the Supreme Court of Appeals, and applied where there was no evidence but the notary's certificate that he mailed notice to the indorsers at Blacksburg, Virginia; but while the court considered that on the demurrer to evidence, in which form the question arose, it should be inferred that their residence was at Blacksburg, it held that no such inference would be justified in the case of a special verdict, it being an inflexible rule that the court upon a special verdict cannot infer other facts from those found by the jury.[1] In a late case in Iowa it was said by the court that "the bare certificate of the notary that he notified the makers and indorsers is itself *prima facie* evidence that they were notified. If he specifies the mode in which he did it, such specification does not destroy the *prima facie* case, nor render it necessary to prove that such mode would effectuate such result, unless indeed it should appear affirmatively that the mode adopted could not have done so. But if the notary only certify the mode he adopted to give the notice, and not to the fact that he did give it, then, unless it further appeared that such mode would effectate notice, the certificate does not make a *prima facie* case."[2] This distinction is very refining, and without just ground. In Indiana it was not taken in a similar case.[3] A certificate

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quiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given that would not be against reason and probability, and the court, upon a demurrer to the evidence, will draw the same conclusions that the jury might have drawn."

It will be perceived that this case does not determine the sufficiency of the evidence if it were merely contained in a statement of the protest. In such case the defendant could have no opportunity to cross-examine, and to elicit the facts respecting reasonable inquiry by the notary, and although the decision just quoted militates strongly against the doctrine of the text, it is therefore, not necessarily inconsistent with it.

[1] Linkous v. Hale, 27 Grat. 668–674 (1876), Moncure, P.

[2] Walmsley v. Rivers, 34 Iowa, 466 (1871). In which case the notary certified that he notified the indorsers, and that he delivered the notice at the post-office addressed to them "Des Moines." And the case was distinguished from Bradshaw v. Hedge, 10 Iowa, 402 (*supra*), in which the notary merely stated that he put notice in the post-office addressed to a certain place named.

[3] Turner v. Rogers, 8 Ind. 140.

of notice to a drawer sent to a place where the bill bears date would stand on a different footing, that being presumably the drawer's place of residence.[1] So where the protest states that notice of protest "was left at the boarding-house of A. B., or the office of C. D., it is not sufficient evidence that it was left in the proper manner.[2] And where it states presentment of a note payable at bank to the cashier, it has been held that it is not to be inferred that the note was in the bank, or unless it was in the bank, that the cashier was at the bank, but that might be proved by other testimony.[3]

§ 963. As to the mere fact that due notice was given, however, when there is no question raised as to the person upon whom, or the place where it was served, the certificate that "due notice was given or mailed, or that the person was duly notified," is sufficient evidence that the notice in itself corresponded to the protest, and was in proper legal form.

A legal notice is a definite legal instrument, and where a statute makes the certificate of the notary evidence as to the service, or as to facts stated respecting notice, it would seem, that his certificate that notice was given, would be as definite as if it detailed the minutiæ of the instrument thus described.[4] But it has been held, that the protest, unless it

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[1] See Chapter XX, on Presentment for Payment, vol. 1, § 639, and Chapter XXIX, on Notice, vol. 2, §§ 1030, 1031.

[2] Rives v. Parmley, 18 Ala. 262, Dargan, C. J., said: "Notice might have been left at the boarding-house of the defendant in a manner wholly insufficient to charge him. Indeed, the notice might have been left at the house on the day stated, and yet the notary might have been guilty of gross neglect, as if he had merely stopped at the house and left the notice without inquiry for the defendant, or saying a word about the object of his visit, or delivering the notice to any one to be handed to the defendant, when he could have delivered it to the party himself by inquiring for him."

[3] Magoun v. Walker, 49 Me. 420; Seneca County Bank v. Neass, 5 Den. 329; *ante*, § 644. But see Barbaroux v. Waters, 3 Metc. (Ky.) 304, and *ante*, § 659.

[4] Tate v. Sullivan, 30 Md. 464; Pattee v. McCrillis, 53 Me. 410; Orono Bank v. Wood, 49 Me. 26; Lewistown Bank v. Leonard, 43 Me. 144; Ticonic Bank v. Stackpole, 41 Me. 321; Simpson v. White, 40 N. H. 540; Bushworth v. Moore, 36 N. H. 144; Galladay v. Bank of Union, 2 Head, 57; Union Bank v. Middlebrook, 33 Conn. 95; McFarland v. Pico, 8 Cal. 626; Kern v. Van Phal, 7 Minn. 426.

states the contents of the notice, is only evidence that what purported to be notice was sent, and not of its sufficiency in law.[1] It seems to us that the separate facts as to service and place, and person should be stated, but that the contents of the notice are to be presumed to be conformable to law.

§ 964. *Presumptions in favor of protest.*—But legal presumptions are made in favor of the protest under proper circumstances. Thus, when the certificate of protest states that demand was made of the clerk of the drawee, found at his office or place of business, the drawee himself being absent, it is evidence not only of the fact of demand, but also that the person named was the drawee's clerk, duly authorized to refuse acceptance or payment.[2] And it would be presumed, if not stated, that the drawee was absent.[3] So (where it is evidence as to notice), if it state that notice was left "at the indorser's desk in the custom house, he being absent, with a person in charge," it is *prima facie* evidence that such was his place of business, and that it was properly left there, it not appearing that better service could have been made.[4] So, if it states demand at his office or place of business, of his book-keeper,[5] or agent,[6] it is evidence that such person was the drawee's agent. But unless the demand was at the drawee's place of business, it would be different; and where the protest was legal evidence of the manner of service of notice, it was held, nevertheless, that the certificate that "a notice to D. B. P., the indorser, was left at the residence of J. P. S., his attorney in fact, with a female white servant, the said J. P. S. not being in," was not evidence that S. was P.'s attorney in fact to receive notice, but only of such matters as it was the notary's duty to certify.[7]

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[1] Ducket v. Van Lilienthal, 11 Wis. 56; Smith v. Hill, 6 Wis. 154; Kimball v. Bowen, 2 Wis. 224. See *post*, § 1051 and notes.

[2] Nelson v. Fotterall, 7 Leigh, 179; Stainback v. Bank of Virginia, 11 Grat. 260; Whaley v. Houston, 12 La. Ann. 585.

[3] Gardner v. Bank of Tenn. 1 Swan, 420.

[4] Bank of Commonwealth v. Mudgett, 44 N. Y. 514.

[5] Phillips v. Poindexter, 18 Ala. 579. [6] Dickerson v. Turner, 12 Ind. 223.

[7] Druumm v. Bradfute, 18 La. Ann. 681.

§ 965. And so a recital in a foreign notarial certificate, that the notary had served the protest on the acceptor, in his own name, and as agent of the drawer, is no evidence of the agency in a suit against the drawer.[1] There is obvious reason in this distinction. When the notary finds a clerk or other person acting as the drawee's representative, in his office or place of business, he has a right to presume that he is duly authorized to represent him. Being held out as his clerk or agent, parties may so regard him. But when it is alleged that a mere outside person is an agent, it is an allegation to be sustained by distinct evidence, like any other separate fact.

If the certificate state that a bill drawn on a firm was presented to A., one of the members thereof, it is evidence of his membership, upon the same principle that it is evidence as to the identity of an individual to whom presentment is made.[2]

When the protest states that notice was sent by mail, it will be presumed that the postage was prepaid.[3]

§ 966. *Not evidence of collateral facts.*—But the certificate of protest is not evidence of any collateral facts which may have been stated in it. Thus, if it state that the reason given by the drawee for non-acceptance was, that he had no effects or funds of the drawer, it is no evidence of the want of effects or funds.[4] Nor is it evidence that the drawee expressed his willingness to pay in certain bank bills.[5]

Nor is it evidence of a course of conduct not specified in particular facts. Thus, where the notary stated in the protest that he "made diligent search and inquiry" for the makers, it was considered not proof of that fact, what search and inquiry not being stated.[6] This seems to us correct, for what

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[1] Coleman v. Smith, 26 Penn. St. 255.

[2] Elliott v. White, 6 Jones (N. C.) 98. [3] Brooks v. Day, 11 Iowa, 46.

[4] Dakin v. Graves, 48 N. H. 45; Dumont v. Pope, 7 Blackf. 367.

[5] Maccoun v. Atchafalaya Bank, 13 La. 342.

[6] Bennett v. Young, 18 Penn. 261. In Cockrill v. Loewenstine, 9 Heisk. 206 (1872), the notarial certificate stated that the notary "made diligent search and

constitutes due diligence is a matter of law, to be adjudicated upon the facts, and is not a matter of notarial judgment and determination.[1]

§ 967. *Protest as secondary evidence of notice.*—Even where there is no statute authorizing it, there may arise circumstances which, upon general principles of the law of evidence, render the protest of a promissory note competent to show due demand and notice. Thus, where the notary who had made the protest had died before the trial, and his testimony could not be procured, the protest of a note, coupled with the deposition of the notary's daughter, as to the uniform habit of her father in his notarial acts, was considered admissible secondary evidence for the purpose of conducing to prove demand and notice.[2] So, where the messenger of a bank was dead, his book in which he entered his acts respecting service of notices, was held admissible to prove that he notified an indorser.[3] And in respect to the form of notice, the notary being dead, his clerk's evidence as to the forms he was accustomed to use, is admissible.[4]

§ 968. *When suit is brought in State or country where protest is made, is it evidence?*—As has been already said, the instrument of protest is only admissible evidence of the facts it asserts in cases of foreign bills, except where statutory enactment has extended their admissibility in cases of inland bills and promissory notes.[5] And it has been held that it can only be used to prove the dishonor when made in a for-

careful inquiry" to find the maker. The court held that this statement was not *prima facie* evidence that he did these things. Sneed, J., said: "The question of diligence is a question of law and fact, to be determined by the court and jury, and not to be certified by the notary. * * The notarial protest by the law and usage of merchants is credited everywhere, and is generally *prima facie* evidence of the facts it recites; but it must state facts, and not legal conclusions."

[1] Cockrill v. Loewenstine, *supra*.

[2] Nicholls v. Webb, 8 Wheat. 450.

[3] Welsh v. Barrett, 15 Mass. 380.

[4] Wetherell v. Claggett, 28 Md. 465.

[5] Union Bank v. Hyde, 6 Wheat. 572; Young v. Bryan, 6 Wheat. 146; Sullivan v. Deadman, 19 Ark. 484; Bond v. Bragg, 17 Ill. 69; Sumner v. Bowen, 2 Wis. 524.

eign country; and that if the bill were drawn in a foreign country, and payable in England, and suit were brought in England, the protest should be proved in the same manner as if it were an inland bill.[1] For this ruling there is the high authority of Lord Ellenborough, who expressed himself as "quite clear" in the opinion, but no precedent was quoted, and it has been criticised by Story, who considers that if the bill be foreign, the protest should be admitted.[2] The United States Supreme Court has intimated its approval of the English precedent quoted; but Story's views seem to us more judicious. Doubtless, the original reason of convenience which recognized the protest of a bill made in foreign parts as evidence of dishonor, does not apply to a case in which the witnesses are within the country. But protest of all foreign bills is essential, irrespective of the place of payment; and if the holder is required to make the protest, it would seem singular and unequal to deny him the benefit of its production.[3]

§ 969. *Evidence to supply omissions of protest.*—When the protest has been made at the proper time and place, and in the proper manner, but does not upon its face make all the statements necessary to prove due demand and notice, parol evidence is admissible to supply the omission, provided it be in furtherance of, and not inconsistent with or contrary to the statements that are made in the protest. Thus, where the protest stated a demand of the cashier, but omitted to state that the note was in, or the cashier at the bank, it was held admissible to prove these facts by parol testimony.[4] So where it did not state where the presentment and demand were made, or that the note was in the bank where it was made payable,[5] or where it fails to inform the indorser of a demand on the maker and a refusal,[6] or to state the fact of

[1] Chesmer v. Noyes, 4 Camp. 129; Byles on Bills (Sharswood's ed.), [*254], 401; Edwards on Bills, 468.

[2] Story on Bills, § 277, note 2.

[3] Nicholls v. Webb, 8 Wheat. 326.

[4] Magoun v. Walker, 49 Me. 420; Seneca Co. Bank v. Neass, 5 Denio, 329.

[5] Wetherall v. Claggett, 28 Md. 465; Hunter v. Van Bomhorst, 1 Md. 504.

[6] Wetherall v. Claggett, 28 Md. 465; Nailor v. Bowie, 3 Md. 252.

non-payment,[1] any legitimate extrinsic evidence is admissible to show that any of these facts existed, or steps were taken. And if there be any question as to the agency of the person to whom presentment was made, evidence is admissible to show it.[2]

In like manner, any defect in the statements respecting notice may be supplied—and indeed, as we have seen, notice may be proved without any aid from the protest, which is only admissible, and not necessary evidence of it.[3]

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[1] Sasscer v. Farmers' Bank, 4 Md. 429.

[2] Stainback v. Bank of Va. 11 Grat. 269.

[3] Graham v. Sangston, 1 Md. 59. See Reynolds v. Appleman, 41 Md. 615.

CHAPTER XXIX.

NOTICE OF DISHONOR OF NEGOTIABLE INSTRUMENTS.

SECTION I.

NATURE AND NECESSITY OF NOTICE.

§ 970. When a negotiable bill or note is dishonored by non-acceptance on presentment for acceptance, or by non-payment at its maturity, it is the duty of the holder to give immediate notice of such dishonor to the drawer, if it be a bill, and to the indorser, whether it be a bill or note. The party primarily liable is not entitled to notice, for it was his duty to have provided for payment of the paper; and the fact that he is maker or drawer for accommodation does not change the rule.[1]

Notice is not due to any party to a bill or note not negotiable, the rules of the law merchant concerning notice and protest applying to none but strictly commercial instruments.[2]

It is regarded as entering as a condition in the contract of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that accept-

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[1] Hays v. N. W. Bank, 9 Grat. 127.

[2] Pitman v. Breckenridge, 3 Grat. 129.

In Early v. Preston, 2 Pat. & Heath, 229, the following notice was accepted as good in form, and seems in every respect unobjectionable:

RICHMOND, August 20, 1842.

SIR: Please take notice that a draft drawn by S. H. Davis on Samuel S. Saunders, dated Lynchburg the 18th of February, 1842, for two thousand dollars, at six months' date, and indorsed by Joel Early and Pleasant Preston and A. Tompkins, Cashier, has been protested for non-payment by the President and Directors of the Farmers' Bank of Virginia, payment having been refused at the counting room of S. S. Saunders on the 20th instant, and you are held liable as indorser for all loss, damages, principal, interest, cost and charges sustained or to be sustained by reason of the non-payment aforesaid.

Yours, ARCHIBALD BLAIR, Notary Public.

ance or payment is only demanded; and he notified if it is not made. And in default of notice of non-acceptance or non-payment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.[1]

This, then, is one of the most important branches of the law of negotiable paper.

§ 970 *a*. In England, in France, and in other countries where there is no restraint by constitutional law upon the legislative department, interdicting its interference with contracts, it is within the power of that branch of the government to extend the time of payment of negotiable and other securities, and consequently to preserve the liability of a drawer or indorser without the preliminary steps respecting protest and notice being taken at the stipulated time of payment, according to the terms of the instrument.[2] But in the United States where the States are prohibited by the Federal constitution from passing any law "impairing the obligation of contracts," it is not within the power of any State legislative body, whether a convention, or an ordinary representative assembly, by ordinance, resolution or enactment, to alter contracts entered into; and as the condition of due notice is regarded as incorporated in the contract of the drawers and indorsers of negotiable paper, it would not be within their power to dispense with it, or change the time within which it must be given, so as to affect existing instruments. This view of the law in the United States was recently taken, and elaborately set forth by the Supreme Court of Appeals of Virginia, which held void an ordinance of the State convention, the effect of which was to dispense with demand, protest, and notice upon all checks, bills and notes payable at a bank located in any city or town, if at the time of the maturity of such instruments, the town was occupied, invested, or access thereto interrupted by the public enemy; and also an Act of the General Assembly which extended the time for giving

[1] Rotschild v. Currie, 41 E. C. L. R. 43; Musson v. Lake, 4 How. 262.

[2] Rouquette v. Overman, L. R. 10 Q. B. 525 (1875).

notice to ten days after the removal of the obstruction created by the presence of the enemy.[1]

§ 971. So absolute is the necessity for notice to an indorser, in order to charge him, that if a note has been indorsed to the holder in conditional payment of a debt, the failure to give notice to the indorser will not only discharge the indorser as a party to the note, but also as debtor upon the original consideration, even though it be secured by a mortgage or deed of trust. The note, then, is made an absolute discharge of his liability, and the indorsee must look solely to prior parties.[2] And so in respect to the drawer of a bill given in conditional payment.[3] The neglect to give notice to the drawer of a renewed bill not only discharges him from liability to pay that bill, but discharges him from liability to pay the prior bill, to satisfy which it was drawn;[4] and this although it be expressly agreed that the taking of such second bill shall not exonerate any of the parties to the first bill until actual payment.[5]

SECTION II.

FORMAL AND ESSENTIAL ELEMENTS OF NOTICE.

§ 972. *Notice may be verbal or written.*—The notice need not be in writing; it is sufficient if it be given verbally;[6] but

[1] Duerson's Adm'r v. Alsop, 27 Grat. 230 (1876). See also Farmers' Bank v. Gunnell, 26 Grat. 144 (1875); see § 871.

[2] Shipman v. Cook, 1 Green (N. J.), 251.

[3] Darrach v. Savage, 1 Show. 155 (1691); Bridges v. Berry, 3 Taunt. 130; Gale v. Walsh, 5 T. R. 239; Rogers v. Stephens, 2 T. R. 713; Rucker v. Hiller, 16 East, 43; 3 Camp. 217; Smith v. Miller, 43 N. Y. 171 (1870); 52 N. Y. 546 (1873); see Chapter XXXIX on Conditional Payment, Sec. III; and Edwards on Bills, 445. See *ante*, § 644, vol. 1.

[4] Bridges v. Berry, 3 Taunt. 130; 3 Maule & S. 362; Chitty on Bills [*433], 488 [*444], 500.

[5] Reid v. Coats, Bro. P. C.; Chitty on Bills [*434], 488.

[6] Boyd's Adm'r v. City Savings Bank, 15 Grat. 501; Glascow v. Pratte, 8 Mo. 366; First National Bank v. Ryerson, 23 Iowa, 508; Cuyler v. Stevens, 4 Wend. 566; Thompson v. Williams, 14 Cal. 160; Gilbert v. Dennis, 3 Metc. 495; Byles on Bills (Sharswood's ed.), 411; Story on Notes, § 341; 1 Parsons N. & B. 477;

for precision and safety written notice is preferable. Verbal notice must be necessarily confined to those cases in which notice is directly given to the party in person, or is sent by a messenger to his place of business or residence. It seems that a verbal notice is less strictly construed than a written one, especially when its sufficiency is impliedly admitted by the party's response.[1] Thus, where the holder's clerk told the drawer that the bill had been duly presented, and that the acceptor could not pay it, and the drawer replied that he would see the holder about it, this was held to be sufficient evidence to warrant the jury in finding that the fact of the dishonor of the note was sufficiently communicated to the drawer.[2]

Mere knowledge of dishonor does not constitute notice.[3] Notice signifies more; but when the fact of dishonor is communicated by one entitled to call for payment, it becomes notice, as it is then to be inferred that the intention is to hold him responsible.[4]

§ 973. *As to the form of the notice*, no particular phrase or form is necessary. The object of it is to inform the party to whom it is sent: 1, that the bill or note has been presented; 2, that it has been dishonored by non-acceptance, or non-payment; and, 3, that the holder considers him liable, and looks to him for payment. And in framing the notice, all that is necessary to apprise the party of the dishonor of the instrument is, to intimate that he is expected to pay it.

In order that a notice should answer these conditions, and duly intimate dishonor to the drawer or indorser, it should therefore, either expressly or by just and natural implication,

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Thomson on Bills, 336; Tindal v. Brown, 1 T. R. 167; Housego v. Cowne, 6 L. J. Exch. 110; Crosse v. Smith, 1 Maule & S. 545.

[1] Byles on Bills [*264], 211, 212; Phillips v. Gould, 8 C. & P. 355 (34 E. C. L. R.)

[2] Metcalfe v. Richardson, 11 Com. B. 1011 (73 E. C. L. R.)

[3] Juniata Bank v. Hale, 16 Serg. & R. 157; Bank of Old Dominion v. McVeigh, 29 Grat. 559; Brown v. Ferguson, 4 Leigh, 37; Story on Bills, § 375.

[4] Caunt v. Thompson, 7 Com. B. 400; Miers v. Brown, 11 M. & W. 372; Tindal v. Brown, 1 T. R. 167.

comprise the following elements: (1) A sufficient description of the bill or note to ascertain its identity. (2) That it has been duly presented for acceptance or payment to the drawee, acceptor or maker. (3) That it has been dishonored by non-acceptance or non-payment. (4) That the holder looks to the party notified for payment.[1]

§ 974. *Description of the bill or note dishonored.*—The notice should describe the bill or note in unmistakable terms; should state where the note is, that the party notified may find it; should state who the holder is, and who gives the notice, or at whose request it is given. Such, at least in theory, are the requisites of a proper notice; and a good business man should never neglect to comply with them. But the courts are not strict in requiring this thorough description of the dishonored instrument; and the requirements of the law are considered as satisfied by any description which, under all the circumstances of the case, so designates the bill or note as to leave no doubt in the mind of the party, as a reasonable man, what bill or note was intended.[2]

§ 975. The object of the law in requiring a correct description of the bill or note to be given in the notice to the drawer or indorser is, that he may be put upon notice of the extent of his liability, and placed in possession of the material facts necessary to enable him to secure the liability of others over to him, and his own reimbursement upon payment of the note. The rule was not intended to subserve a technical purpose, but to promote substantial justice; and when it sufficiently appears that the drawer or indorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, he should not be permitted to object that his information was not communicated in a particular

[1] Bank of Old Dominion v. McVeigh, 29 Grat. 558; Thompson v. Williams, 14 Cal. 162; Story on Notes, § 348.

[2] Gilbert v. Dennis, 3 Metc. 495; Shelton v. Braithwaite, 7 M. & W. 436; 1 Parsons N. & B. 472, 474.

manner.[1] Accordingly, it has been held in California that where the holder verbally informed the indorser that "he had demanded payment of that note, and should endeavor to make him liable," the indorser was bound, although the note was neither produced nor described, as it appeared that he knew what note was referred to, and was in no respect misled.[2]

§ 976. Story says, that "the description of the note should be sufficiently definite to enable the indorser to know to what one in particular the notice applies; for an indorser may have indorsed many notes of very different dates, sums and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the note is special to which it properly applies or which it designates."[3] This is undoubtedly the correct statement of the general rule, as to the best mode of preparing notice; but if it were intended to confine the parties to the mere face of the notice to ascertain its sufficiency, it would be clearly erroneous. For there is no doubt, that the circumstances of each particular case, and the indorser's or drawer's knowledge of them may be looked to, to ascertain whether or not the notice is sufficient. And if the drawer or indorser could not reasonably confound the bill or note mentioned in the notice with another, the notice would be sufficient, although meager in its description. And if full and ample in setting forth the terms of the note, it would make no difference that the notice left the indorser in doubt as to what instrument it referred to, it being his misfortune, if from his having indorsed several notes, a complete description of one of them, in every essential feature, does not enable him to identify it.[4]

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[1] Thompson v. Williams, 14 Cal. 162, language of Cope, J.

[2] Thompson v. Williams, *supra*.

[3] Story on Promissory Notes, § 349; Cook v. Litchfield, 5 Seld. 289.

[4] Hodges v. Shuler, 22 N. Y. 115 (1860). The defendant executed a number of notes in all respects alike, and distinguishable only by the numbers marked on the margin. It was held that the omission to state the number in a notice of non-payment of one of them, did not vitiate it.

§ 977. In New York, where defendant was payee and indorser of four several notes made by J. L. Caren, and dated each "Detroit, April 2d, 1849," it appeared that each note was for the sum of $740, and were precisely the same terms, except that one was payable in nine, one ten, one eleven, and the other twelve months from date. Each note was presented and protested on the day of maturity, and notices addressed to the indorser, each stating that the note to which it referred, "was duly protested for non-payment on the day that the same became due." In a suit upon the notes, it was held by the Superior Court that the notices were sufficient, inasmuch as they informed the indorser that each note was protested on the day it became due, and although they did not describe the respective notes by their dates, they sufficiently identified them as the notes falling due on the very days they were respectively protested.[1] This decision was subsequently reversed by the Court of Appeals, on the ground that the description of the notes was insufficient, in not distinguishing the one from the other, and a new trial ordered.[2] And finally judgment was rendered for the plaintiff, the jury having found as a fact that the defendant knew to what particular notes the notices respectively related.[3] The Superior Court reluctantly bowed to the authority of the Court of Appeals, in respect to the doctrine enunciated; and the views of the Superior Court seem to us altogether unanswerable.[4]

§ 978. The entire omission of the maker's name in the notice of dishonor of a note would be fatal;[5] but notice to the acceptor describing the bill as "drawn by you," though not naming the drawer, has been held sufficient, there being no proof that he had drawn or indorsed any other paper with which it could be confounded, and it being otherwise cor-

[1] Cook v. Litchfield, 5 Sandf. 340 (1851), Duer, J.

[2] Cook v. Litchfield, 5 Seld. 286 (1853), Ruggles, C. J.

[3] Cook v. Litchfield, 2 Bosw. 147 (1857), Bosworth, J.

[4] See Hodges v. Shuler, 22 N. Y. 115, and *ante*, § 976.

[5] Home Insurance Company v. Green, 5 Smith (19 N. Y.) 518; see, also, Stockman v. Parr, 11 Mees. & W. 809; s. c. 1 Car. & K. 41.

rectly described.[1] And likewise, notices describing a note as a bill,[2] a bill as a note,[3] or the drawer as acceptor,[4] or the indorser as maker,[5] have been held not vitiated thereby.

Where a note is made payable to two persons jointly, and indorsed by each, it is not indispensable that notices of protest should be addressed to them jointly, or refer to their joint indorsement, and notices addressed to them severally, each describing the note as indorsed by the person to whom it is addressed, without mentioning the other indorser, are sufficient to charge them, being in other respects unobjectionable.[6]

§ 979. The notice need not state who is the holder of the bill or note,[7] nor at whose request it is given.[8] For although the protest and notice are nullities, unless proceeding from the request of a party entitled to direct them, the objection that the party is a stranger must appear from proof, and is not presumable from the mere omission of the notice to state the interest or relation of the party sending it;[9] nor where the demand was made;[10] nor at what hour the paper was pre-

[1] Gill v. Palmer, 29 Conn. 54.

[2] Messenger Southey, 1 Man. & G. 76 (39 E. C. L. R.)

[3] Stockman v. Parr, 11 M. & W. 809.

[4] Mellersh v. Rippen, 7 Exch. 578, overruling, in effect, Beauchamp v. Cash, 1 Dow. & R. 3, where it was held that a notice calling the "drawer" an "indorser" was bad.

[5] Haines v. Dubois, 1 Vroom (N. J.), 259.

[6] Cayuga Co. Bank v. Warden, 2 Seld. 19.

[7] Mills v. Bank United States, 11 Wheat. 431; Bradley v. Davis, 26 Me. 45; Howe v. Bradley, 19 Me. 35.

[8] Shed v. Brett, 1 Pick. 401.

[9] Gillespie v. Nevill, 14 Cal. 408.

[10] Mills v. Bank United States, 11 Wheat. 431. In this case the Supreme Court said: "The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is a matter of evidence, to be established at the trial. If it be not legally made no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, prac-

sented;[1] nor where it is lying, nor on whose behalf payment is demanded;[2] nor that the party presenting had the paper with him at the time;[3] nor at what time it fell due;[4] nor the absence of the maker when it was presented.[5]

But it should be signed or indicated from whom it proceeds—otherwise it will be insufficient.[6] It is not necessary that the party should know the fact of dishonor, if the notice unequivocally states it.[7]

The decisions in the United States go to the extent of holding that a notice to the indorser of a note, simply stating the name of the maker, the amount, and the fact that it was indorsed by the party to whom notice was sent, is sufficient.[8] But if there are any circumstances which caused this meager description to mislead the party receiving the notice—as, for instance, if he were the indorser of two or more notes to which the terms of the notice might equally apply—then the notice might be void for uncertainty of description.[9]

A notice without date, stating that the instrument had been "this day presented for payment," would be defective in not fixing the date of dishonor, though extraneous evidence might doubtless be introduced to show that the defect did not mislead the indorser, and that the dishonor was, in fact, at the proper time.[10] No misdescription of the date of the instrument will vitiate the instrument, unless it misleads.[11]

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tice is not to state in the notice the mode or place of demand, but the mere naked fact of non-payment." See remarks on this case in Gilbert v. Dennis, 3 Metc. 409, quoted *post*, § 983, p. 39, note 3.

[1] Fleming v. Fulton, 6 How. (Mo.) 473.

[2] Woodshop v. Lawes, 2 M. & W. 109; Harrison v. Ruscoe, 15 M. & W. 231.

[3] Mainer v. Spurlock, 9 Rob. (La.) 161.

[4] Denegre v. Hiriart, 6 La. Ann. 100.

[5] Sanger v. Stimpson, 8 Mo. 260.

[6] Klockenbaum v. Pierson, 16 Cal. 375; Walker v. State Bank, 8 Miss. 704.

[7] Jennings v. Roberts, 4 E. & B. 615 (82 E. C. L. R.)

[8] Housatonic Bank v. Laflin, 5 Cush. 546; Youngs v. Lee, 18 Barb. 187; Beals v. Peck, 12 Barb. 245.

[9] 1 Parsons N. & B. 473; Story on Bills, § 301; Cook v. Litchfield, 5 Seld. 279; Cayuga Bank v. Warden, 1 Coms. 415.

[10] Wynn v. Alden, 4 Den. 163; Thompson v. Williams, 14 Cal. 164; Reynolds v. Appleman, 41 Md. 615. But this is doubtful. 1 Parsons N. & B. 474.

[11] Mills v. Bank United States, 11 Wheat. 431. In the case cited, the note of

Nor will such a misdescription of the amount;[1] nor of the names of the parties;[2] nor of the time the paper fell due.[3]

Wood & Ebert, for $3,600, was dated "20th July, 1819," and was payable "sixty days after date, at the office of discount and deposit of the bank of the United States, at Chilicothe," and the notice was as follows:

"CHILICOTHE, 22d September, 1819.

"SIR: You will hereby take notice that a note, drawn by Wood & Ebert, dated 20th day of September, 1819, for $3,600, payable to you or order in sixty days at the office of discount and deposit of the Bank of the United States, at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you.

"Yours, respectfully,

"LEVI BELT, Mayor of Chilicothe.

"PETER MILLS, Esq."

The notice was sustained, the Court saying that the error of substituting September for July was apparent on the face of the notice, and immaterial, as the mistake could not mislead. Dennistoun v. Stewart, 17 How. 606; Tobey v. Lennig, 14 Penn. St. 483; Kilgore v. Buckley, 14 Conn. 362; Ross v. Planters' Bank, 5 Humph 335; Cayuga County Bank v. Warden, 1 Coms. 413; Byles on Bills, (Sharswood's ed.) [*269], 417; Thompson v. Williams, 14 Cal. 162.

[1] Bank of Alexandria v. Swann, 9 Pet. 33, in which case the Court said: "The misdescription complained of in this case is in the amount of the note. The note is for $1,400, and the notice describes it as for the sum of $1,457. In all other respects the description is correct; and in the margin of the note is set down in figures, 1,457; and the question is, whether this was such a variance or misdescription as might reasonably mislead the indorser as to the note for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the 5th of February, 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake indorsed by the defendant, discounted by the bank, or placed in the bank for collection, or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note." Bank of Rochester v. Gould, 9 Wend. 279; Reedy v. Seixas, 2 Johns. Cas. 337; Rowan v. Odenheimer, 5 Sm. & M. 44; Snow v. Perkins, 2 Mich. 238; Wood v. Watson, 53 Me. 300.

In Cayuga County Bank v. Warden, 1 Coms. 413; 2 Seld. 19, the note was for $600, and the notice to the indorsers described it as for $300. It being the only note of the maker, Warden, indorsed by the defendants, and "$600" being indorsed on the margin of the notice, it was held sufficient. Jewett, Ch. J.: "Who can doubt but that this notice conveyed to the minds of the defendants the information that this identical note had been dishonored, although it misdescribed the note as it respects the sum for which it was made in the body of it?" See, also, Downer v. Remer, 23 Wend. 670.

[2] Dennistoun v. Stewart, 17 How. 606; Carter v. Bradley, 19 Me. 62; Smith v. Whiting, 12 Mass. 6.

[3] Smith v. Whiting, 12 Mass. 6, see § 984.

§ 980. *As instances.*—Notices in which the indorser was termed "Samuel A. Bradbury," while his real name was "Samuel A. Bradley;"[1] describing "J. Cushman," as "J. Cushing;"[2] one "Byron" as "Pyron,"[3] have been held sufficient. So notices describing the bill as dated "28th October," whereas it bore date the 23d;"[4] describing a note as for "$200," which was only for "$175;"[5] describing the amount as "$999 52," instead of $599 52;"[6] and the amount as "$300," instead of "$600,"[7] have been held sufficient, the party not being misled.

§ 981. Where there was a misstatement in the notice of the party on whose behalf it was given, it was held that the notice was not thereby wholly avoided; but the party giving it was placed in the same situation, as to the party to whom it was given, as if the representation had been true. And, therefore, that defendant would be entitled to every defense against the plaintiff that he would have had if the notice had been given by the party named.[8]

§ 982. *In the second and third place, as to the statement of presentment and dishonor*, it was held at one time that the presentment and dishonor of the bill or note must appear on the face of the notice "in express terms or by necessary implication;"[9] but the later and better ruling is that it is sufficient if this appear by "reasonable intendment."[10] Though properly understood, the sense of the two phrases is pretty much the same, for "necessary implication means not

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[1] Carter v. Bradley, 19 Me. 62.
[2] Smith v. Whiting, 12 Mass. 6.
[3] Moorman v. Bank of Alabama, 12 Ala. 353.
[4] McCune v. Belt, 38 Mo. 291.
[5] Snow v. Perkins, 2 Mich. 238.
[6] Downer v. Remer, 23 Wend. 670; 25 Id. 277.
[7] Cayuga Co Bank v. Warden, 1 Coms. 413; 2 Seld. 19.
[8] Harrison v. Ruscoe, 15 M. & W. 231.
[9] Solarte v. Palmer, 7 Bing. 530 (20 E. C. L. R.); 5 Moo. & P. 475; 1 Cromp. & J. 417; 1 Tyrw. 371; Boneton v. Welsh, 3 Bing. N. C. 688; Byles on Bills, (Sharswood's ed.) [*265], 413.
[10] Hedger v. Steavenson, 2 M. & W. 799; Lewis v. Gompertz, 6 M. & W. 402; Byles on Bills (Sharswood's ed.), 413, n. 9, and [*265], 416; Chitty [*466], 525; Edwards on Bills, 595.

natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed."[1] But it is quite clear that it will not be sufficient merely to state in the notice the fact of non-payment of the bill or note, without stating that payment was demanded of the maker, drawee or acceptor, as the case may be, or stating some legal excuse for not making such demand. It should state whether or not the paper has been presented for payment; and if not, why not, for the reason that the indorser has a right to be informed of the facts on which the liability depends, to the end that he may judge for himself whether or not it is his duty to pay it.[2]

§ 983. The mere statement that the bill or note is unpaid is not sufficient to intimate by "reasonable intendment" that the bill or note has been dishonored, for the holder may not have used due diligence in presenting it; and therefore something more must appear.[3] But it may be

[1] Wilkinson v. Adams, 1 Ves. & B. 466, Lord Eldon; Hedger v. Steavenson, 2 M. & W. 799; 5 Dowl. 771, Parke, B.

[2] Page v. Gilbert, 60 Me. 488 (1872), Walton, J.: "A notice to the indorser of a note, which merely informs him of the non-payment of the note, and demands payment of him, without stating that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is not sufficient to charge the indorser.

"The notice should state whether or not the note has been presented to the maker for payment; and if not, why not. The indorser has a right to be informed of those facts on which his liability depends, to the end that he may judge for himself whether or not it is his duty to pay the note. A notice which merely states that the note has not been paid, without stating whether or not it has been presented for payment, or giving any excuse for not presenting it, is not sufficient; for such a notice may be strictly true in every particular, and yet the indorser not be liable. When the official certificate of a notary public states that he 'duly' notified the indorser, it is sufficient *prima facie* to charge the indorser; because the notary could not properly say he had 'duly' notified him unless he had given him notice of a demand as well as of non-payment of the note." Union Bank v. Humphreys, 48 Me. 172; Strange v. Price, 2 Perry & D. 278. Cromer v. Platt, 37 Mich. 138.

[3] Phillips v. Gould, 8 C. & P. 355 (34 E. C. L. R.); Strange v. Price, 10 Ad. & El. 125 (37 E. C. L. R.); Furze v. Sharwood, 2 Q. B. 338 (42 E. C. L. R.); Messenger v. Southey, 1 Man. & G. 76 (39 E. C. L. R.); Boucton v. Welsh, 3 Bing. N. C. 688 (32 E. C. L. R.); Hartley v. Case, 4 Barn. & C. 339; Gilbert v. Dennis, 3 Metc. 495; Townsend v. Lorain Bank, 2 Ohio St. 355; Armstrong v.

when the paper is payable at a bank.[1] Nor will it be sufficient to say simply that payment was demanded, unless it appear also that it was presented.[2] But the direct statement that the instrument has been "dishonored," is sufficient, that word including the presentment and demand which were necessary;[3] and there are other words which, coupled with the statement of non-payment, indicate sufficiently a dishonor. Thus: "Your bill is unpaid, noting, 5*s.*;"[4] or, "is this day returned with charges;"[5] or, "expenses;"[6] or, "with charges

Thruston, 11 Md. 148; Graham v. Sangston, 1 Md. 60; Arnold v. Kinloch, 50 Barb. 44; Ething v. Schuylkill Bank, 2 Barr. 356; Sinclair v. Lynch, 1 Spears, 244; Clark v. Eldridge, 13 Metc. 96; Pinkham v. Macy, 9 Id. 174; Lockwood v. Crawford, 18 Conn. 361; Cromer v. Platt, 37 Mich. 138. In Mills v. Bank United States, 11 Wheat. 431, cited in a previous note, it is said *obiter* by the Supreme Court that "the mere naked fact of non-payment is sufficient." This dictum, as explained in Gilbert v. Dennis, 3 Metc. 495, is reconcilable with the text, and we concur fully in what is said by Shaw, C. J., in the latter case. Says he, speaking of the case of Mills v. Bank United States: "In the case then before the court, the notice contained a full and precise statement of the presentment, demand and non-payment by the maker. The objection with which the court was dealing was, that the notice did not specify the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of non-payment. Applied to the facts of that case, it may be construed to mean non-payment after due presentment. So when the learned judge speaks of the practice of commercial cities, he speaks of notice of the mere naked non-payment, in contradistinction to stating in the notice the mode and place of demand. That such is the meaning may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies non-payment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of non-payment is notice of dishonor; as where the note is in terms, or by usage or special agreement, payable at a bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored."

[1] See previous note.

[2] Musson v. Lake, 4 How. 262.

[3] Stocken v. Collin, 9 C. P. 653 (38 E. C. L. R.); s. c. 7 M. & W. 515; Woodthorpe v. Lawes, 2 M. & W. 109; Shelton v. Braithwaith, 7 M. & W. 436; Edmunds v. Cates, 2 Jur. 183; Lewis v. Gompertz, 6 M. & W. 400; King v. Bickley, 2 Q. B. 419; Rowland v. Sprinjett, 14 M. & W. 7 (7 E. C. L. R.); Smith v. Boulton, 1 Hurl. & W. 3.

[4] Armstrong v. Christiana, 5 C. B. 687 (57 E. C. L. R.); Hedger v. Steavenson, 2 M. & W. 799; 5 Dowl. 771.

[5] Grudgeon v. Smith, 6 Ad. & El. 499 (33 E. C. L. R.); 2 Nev. & P. 303; Everard v. Watson, 1 El. & B. 801.

[6] Everard v. Watson, *supra.*

of protested exchange."[1] The expression "returned unpaid" was held insufficient to indicate dishonor at one time;[2] but subsequently the opposite view prevailed.[3]

And likewise "protested,"[4] in the case of promissory notes and inland bills,[5] as well as of foreign bills.[6] Where the notice of the maker's non-payment of an installment, states that the holder looks to the indorser for payment of the installment and of the interest on the note, the surplusage does not vitiate it.[7]

§ 984. There is conflict of authority on the question whether or not the indorser is discharged by a misstatement in the notice of the time of presentment or protest, when in fact there had been no irregularity. Some cases hold that, if he were not misled or deceived, the notice is valid;[8] but others decide it to be invalid, on the ground that it, in fact, communicates to the party that he is discharged in stating presentment or protest at an improper time.[9] But it is obvious that the

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[1] De Wolf v. Murray, 2 Sandf. 166.

[2] Boulton v. Welsh, 3 Bing. N. C. 688.

[3] Robson v. Curlewis, Car. & M. 378; s. c. 2 Q. B. 421.

[4] Wheaton v. Wilmarth, 13 Metc. 422; Saltmarsh v. Tuthill, 13 Ala. 390; McFarland v. Pico. 8 Cal. 636; Eastman v. Turman, 24 Cal. 383; see also Burkham v. Trowbridge, 9 Mich. 209; Edwards on Bills, 295.

[5] Mills v. Bank United States, 11 Wheat. 431; Bank of Alexandria v. Swann, 9 Pet. 33; Brewster v. Arnold, 1 Wis. 264; Kilgore v. Buckley, 14 Conn. 362; Smith v. Little, 10 N. H. 526; Howe v. Bradley, 19 Me. 31; Cook v. Litchfield, 5 Sandf. 330; 5 Seld. 279; Youngs v. Lee, 2 Kern. 551; Housatonic Bank v. Laflin, 5 Cush. 546; Beals v. Peck, 12 Barb. 445; Denegre v. Hiriart, 6 La. An. 100; Burgess v. Vreeland, 4 N. J. 71; *contra*, Platt v. Drake, 1 Doug (Mich.) 296, overruled by Burkham v. Trowbridge, 9 Mich. 209.

[6] Crawford v. Branch Bank, 7 Ala. 205; Spies v. Newbury, 2 Doug. (Mich. 495.

[7] Fitchburg Mutual Fire Ins. Co. v. Davis, 121 Mass. 121.

[8] Ontario Bank v. Petrie, 3 Wend. 456; Crocker v. Getchell, 23 Me. 392; Byles on Bills (Sharswood's ed.) [*269], 417, note 1; Journey v. Pierce, 2 Houston.

[9] Routh v. Robertson, 11 S. & M. 362; Etting v. Schuylkill Bank, 2 Penn. St. 355; Ransom v. Mack, 2 Hill, 587; Townsend v. Lorain Bank, 2 Ohio St. 345; 1 Parsons N. & B. 476. In Reynolds v. Appleman, 41 Md. 615, this view seems to be approved, but it was held inapplicable to the case considered. In this case the notarial certificate was dated December 23d, and stated that the note "is delivered to me for protest, the same not being paid, payment thereof having been demanded and refused." The Court said, through Bartel, C. J.: "This implies

holder in such a case claims that the party is not discharged, and he is notified that he is held liable, and looked to for payment. He ought not to be misled by the mere circumstance of a mistaken date, which on its face would seem to be a mistake. And if in fact, there was due presentment and protest in the proper time, it would be adopting a technicality quite opposed to the uniform liberal spirit of the law of notice to discharge the indorser on account of it.

§ 985. *In the fourth place.*—As to the statement that the holder looks to the party to whom notice is sent for payment, the express statement in the notice to this effect was, as it might seem, formerly held necessary;[1] but the prevailing rule at the present time is, that the mere fact of giving notice to the party implies that he is looked to for payment.[2]

On this subject it has been said by the United States Supreme Court:[3] "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice."

§ 986. When a protest is necessary in order to charge

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in the absence of any statement to the contrary that the demand was duly made at the maturity of the note," the note fell due, and was duly presented on December 22d, as was proved by parol testimony. Edwards on Bills, 593.

[1] Tindal v. Brown, 1 T. R. 169; Solarte v. Palmer, 7 Bing. 530 (20 E. C. L. R.)

[2] Bank of Cape Fear v. Seawell, 2 Hawks, 560; Warren v. Gilman, 5 Shep. 360; Shrieve v. Duckham, 1 Litt. 194; Cowles v. Harts, 3 Conn. 517; Townsend v. Lorain Bank, 2 Ohio St. 345; Burgess v. Vreeland, 4 N. J. 71; Barstow v. Hiriart, 6 La. An. 98; Story on Promissory Notes, § 353; Furze v. Sharwood, 2 Q. B. 388 (42 E. C. L.); Chard v. Fox, 14 Q. B. 200 (68 E. C. L. R.); Metcalf v. Richardson, 20 Eng. L. & Eq. 301; Miers v. Brown, 11 Mees & W. 372; Caunt v. Thompson, 7 C. B. 400 (62 E. C. L. R.); King v. Buckley, 2 Q. B. 419 (42 E. C. L. R.); Edwards on Bills, 598, 660.

[3] Bank U. S. v. Carneal, 2 Pet. 543.

the drawer or indorser, the notice should state that the bill was protested, in order to show that his liability was fixed; but if, in point of fact, the bill was noted for protest, no statement as to protest in the notice is necessary. And in one case, where the notice stated expressly that the bill had not been protested, it was held by the court, that it might mean no more than that the protest had not been extended, and it might still be understood that it had been noted.[1] Where the party receiving notice is abroad, it has been said that the notice should mention the protest, since he could not readily ascertain as to the fact by inquiry,[2] but this doctrine does not seem to have become ingrafted into the principles of the law merchant.

It is now settled—though the contrary at one time was maintained—that it is not necessary that a copy of the protest of a foreign bill should accompany notice of its dishonor.[3] But information of the protest should be sent if the party to whom notice is transmitted resides abroad.[4]

SECTION III.

WHO MAY GIVE NOTICE OF DISHONOR.

§ 987. The notice of dishonor should emanate from the holder of the instrument at the time of its dishonor, and should be communicated to all the parties whom he means to hold liable for its payment. But it is not absolutely necessary that it should come from him, for the holder is entitled to the benefit of notice given in due time by any party to the instrument who would be liable to him if he, the holder, had

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[1] Brown v. Dunbar, Thomson on Bills, 332.

[2] Lord Ellenborough, in Rollins v. Gilson, 3 Camp. 334; 1 M. & S. 288; Thomson on Bills, 334.

[3] Goodman v. Harvey, 4 Ad. & El. 870 (31 E. C. L. R.); Wallace v. Agry, 4 Mason, 336; Story on Bills, § 302.

[4] See Rogers v. Stephens, 2 T. R. 713; Byles on Bills (Sharswood's ed.) [*270], 418.

himself given him notice of dishonor.[1] Thus if the holder duly notifies the sixth indorser, and he the fifth, and he the fourth, and so on to the first, the latter will be liable to all the parties.[2] Where the holder has duly notified, or exercised due diligence to notify the several and successive indorsers, and an intermediate indorser who did not himself notify his predecessors, takes up the bill or note, there is no doubt that the notice sent them by the holder to whom he makes payment inures to his benefit, provided it actually reached them.[3] But it has been observed that it would seem to be still unsettled whether the notice inured to the benefit of the intermediate indorser, when the holder's diligence in sending notice did not secure its actual reception.[4] In the single American case, deciding the question, which we have seen, it was held that the plaintiff could not avail himself of the diligence of the holder in such a case, and "that there was no authority for holding that an excuse for the omission to serve notice by the holder should extend to other parties for whom there is no such excuse."[5] But high authority has sustained the view that all the indorsers being liable to the holder, an intermediate indorser on paying him becomes substituted to his rights and is entitled to recover.[6] And Thomson considers the doctrine settled to this effect.[7]

§ 988. *It is certain that notice from a mere stranger*[8] *is in-*

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[1] Chapman v. Keene, 3 Ad. & El. 193; 4 Nev. & M. 607; Lysaght v. Bryant, 9 C. B. 46; s. c. 2 Carr. & K. 1016; Jameson v. Swinton, 2 Camp. 373; Wilson v. Swabey, 1 Stark. 34; Stafford v. Yates, 18 Johns. 327; Bachellor v. Prest, 12 Pick. 496; Stanton v. Blossom, 14 Mass. 116; Bank U. S. v. Goddard, 5 Mason, 366; Triplett v. Hunt, 3 Dana, 126; Renshaw v. Triplett, 23 Mo. 213; Whitman v. Farmers' Bank, 8 Porter (Ala.) 258; Wilson v. Mitchell, 4 How. (Miss.) 272; Marr v. Johnson, 9 Yerg. 1; Abat v. Rion, 9 Mart. (La.) 465; Story on Prom. Notes, § 301; Story on Bills, § 304; 1 Parsons N. & B. 503, 504; [Tindal v. Brown, 1 T. R. 467, and *Ex parte* Barclay, 7 Ves. 597, are overruled]; Thomson on Bills, 357; Edwards, 626, 627; Swayze v. Britton, 17 Kansas, 627.

[2] Hilton v. Shepherd, 6 East. 14; Swayze v. Britton, 17 Kansas, 627.

[3] Stafford v. Yates, 18 Johns. 327.

[4] 1 Parsons N. & B. 627.

[5] Beale v. Parrish, 20 N. Y. 407, overruling 24 Barb. 243.

[6] 1 Parsons N. & B. 627.

[7] Thomson on Bills, 327.

[8] Stanton v. Blossom, 14 Mass. 116; Chanoine v. Fowler, 3 Wend. 173; Juni-

sufficient, and it is equally well established that a party to the bill who has been discharged by laches, and who could not in any event sue, cannot give notice for his own or another's benefit, he being then a mere stranger to the paper.[1]

The broad doctrine is laid down by some of the authorities that any party to the instrument may give notice;[2] but as we have already seen this rule is certainly not without exception, for if the party be discharged he can no longer interfere with the rights of others. And the proper limitation to the rule seems to be that he must be a party whose liability is fixed; or one who, on the paper being returned to him when he pays it, will be entitled to re-imbursement from some prior party.[3]

§ 989. The liability of the party must be fixed before he is himself competent to give notice, and that it may inure to the holder's benefit.[4] But it is not necessary that he should be himself aware at the time that his own liability has been duly fixed by dishonor in proper form; for if the fact have been so, and the notice to him have been given, the requisites to his liability are there, and his own state of mind on the question cannot alter the situation.[5]

§ 990. Whether or not the acceptor of a bill, who refuses

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ata Bank v. Hale, 16 Sergt. & R. 157; Brailsford v. Williams, 15 Md. 150; Stewart v. Kennett, 2 Camp. 177; Byles on Bills (Sharswood's ed.) [*278], 430; Story on Notes, § 301; Thomson on Bills, 355; Edwards, 626.

[1] Harrison v. Ruscoe, 15 L. J. Exch. 110; 15 M. & W. 231; Turner v. Leech, 4 B. & Ald. 451; Rowe v. Tipper, 13 C. B. 249; Thomson on Bills, 358.

[2] See 1 Parsons N. & B. 503; Wilson v. Swabey, 1 Stark. 34. In Chitty on Bills, c. 10, pp. 524, 527, it is said: "It suffices if it be given after the bill was dishonored by any person who is a party to the bill, or who would on the same being returned to him, and after paying it, be entitled to require re-imbursement." And Story on Bills, § 304, adopts the principle in almost the identical language of Chitty.

[3] In Bayley on Bills, it is said (pp. 254, 256): "The notice must come from the holder or from some party entitled to call for payment or re-imbursement." See also Chanoine v. Fowler, 3 Wend. 173.

[4] Lysaght v. Bryant, 9 C. B. 46; Harrison v. Ruscoe, 15 M. & W. 231; Thomson on Bills (Wilson's ed. 1865), 357; Bayley on Bills, 254.

[5] Jennings v. Roberts, 24 L. J. Q. B. 102; Thomson on Bills, 358.

or fails to pay it, may give the notice, has been a matter of difference. In respect to the early cases, which held that he could,[1] it has been said by some of the text writers that they must have been cases in which the holder constituted the acceptor his agent for that purpose.[2] There are also cases which hold that the maker of a note may give notice.[3] But the cases which maintain the doctrine do not rest it on the ground of agency. It was, at one period, held in England that no one but the holder at the time could give a valid notice;[4] but the rule became re-established that the acceptor might do so, and now the principle is settling down to that effect. In re-asserting the doctrine, Lord Denman, after referring to *Ex parte* Barclay, and Tindal v. Brown, quoted in the previous note, said:[5] "Notwithstanding these high authorities, it is clear, from Jameson v. Swinton, 2 Camp. 373; Wilson v. Swabey, 1 Stark. N. P. C. 34; and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled, as holder, to sue upon the bill, may avail himself of notice given in due time by any party to it. * * We are now compelled to determine whether the case of Tindal v. Brown, as to this point, be good law. We think that it is not." This language of Lord Denman was approved in Maryland in a well considered case, and Tuck, J., added: "We may consider the doctrine then announced established law."[6] It has been held,

[1] Shaw v. Craft (1793), Chitty on Bills, 333; Rosher v. Kiernan, 4 Camp. 87.

[2] Byles on Bills (Sharswood's ed.) [*279], 431, 432; Bayley on Bills (5th ed.), 254; Thomson on Bills (Wilson's ed. 1865), 359; 1 Parsons N. & B. 505; Parke, B., in Harrison v. Ruscoe, 15 M. & W. 231.

[3] First National Bank v. Ryerson, 23 Iowa, 508; Glasgow v. Pratte, 8 Mo. 336; Wade on Notice, § 713.

[4] Tindal v. Brown, 1 Term R. 167; *Ex parte* Barclay, 7 Ves. 597; Stewart v. Kennett, 2 Camp. 177.

[5] Chapman v. Keene, 3 Ad. & El. 193 (30 E. C. L. R. 69); Thomson on Bills, 356.

[6] Brailsford v. Williams, 15 Md. 157 (1859), Tuck, J., saying: "In Jameson v. Swinton, 2 Camp. 373, where the notice was not given by the holder of the

in Massachusetts, that a drawee who refuses acceptance cannot give a valid notice.[1]

Professor Parsons dissents from the views of the later authorities, and considers that notice must emanate from one who, if he were owner, could recover of some other party to the paper. But, as matter of authority, the doctrine seems now to be established, whatever be its merit. And as any established rule of mercantile conduct is better than continuous shifting, we suppose the courts will not be disposed to disturb it, whether they find it necessary to adopt the idea of agency or otherwise.

§ 991. *Notice by agent.*—Notice given by an agent is the same as if by the holder himself, and it may be either in the agent's name[2] or in the name of another party.[3] The notary to whom the bill or note has been given for presentment may, as the agent of the holder, give notice;[4] but it is no part of his official duty;[5] and a bank holding a bill or note for collection, or its officers or agents, should, as a matter of duty, give the notice necessary.[6] Any person, indeed, in whose

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bill, but by his immediate indorser, who had received notice, the Court said: 'The drawer or indorser is liable to all subsequent indorsers, if he had due notice of the dishonor of the bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed that the bill is dishonored; he is enabled to take it up, if he pleases, and may immediately proceed against the acceptor or prior indorsers.'"

[1] Stanton v. Blossom, 14 Mass. 116.

[2] Woodthorpe v. Lawes, 2 M. & W. 109.

[3] Rogerson v. Hare, 1 Jur. 71; Harrison v. Ruscoe, 15 M. & W. 231; Byles on Bills (Sharswood's ed.), 432.

[4] Smedes v. Utica Bank, 20 Johns. 372; s. c. 3 Cow. 662; Bank of Utica v. Smith, 18 Johns. 230; Safford v. Wyckoff, 1 Hill (N. Y.) 11; Cowperthwaite v. Sheffield, 1 Sandf. 416; Crawford v. Branch Bank, 7 Ala. 205; Shed v. Brett, 1 Pick. 401; Fulton v. McCracken, 18 Md. 528; Renick v. Robbins, 28 Mo. 339; Swayze v. Britton, 17 Kan. 629.

[5] Burke v. McKay, 2 How. 66; Harris v. Robinson, 4 How. 336; Swayze v. Britton, 17 Kan. 625. See *ante*, Chapter XXVIII, on Protest, § 960 It is held in Tennessee that a notary failing to give notice is liable on his official bond, he having been instructed to give it, and it thus becoming under the Tennessee statute a part of his official duty. Wheeler v. State, 9 Heisksll, 393.

[6] Ogden v. Dobbin, 2 Hall, 112; Freeman's Bank v. Perkins, 7 Shep. 292; Bank of State of Missouri v. Vaughan, 36 Mo. 90.

hands the bill lawfully is, may give the notice as holder or agent, as the case may be, and, if as agent, a verbal authority from the holder is sufficient.[1]

§ 992. A banker with whom a bill or note is deposited to present for acceptance or payment, or any agent to whom it is indorsed for collection, is to be regarded as a distinct holder for the purposes of notice, and has the same time to notify his principal, and the principal the prior parties, as if such banker or agent were the real owner[2]—but the mere servant acting as the principal would not be.[3] The same rule applies to the several branches of the same bank.[4]

Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man requesting him to ascertain the indorser's residence, and received an answer with information on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th, forwarded the letter containing notice of dishonor, it was held sufficient.[5]

The factor, or other agent or attorney, may not know

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[1] Story on Bills, § 303; Byles on Bills (Sharswood's ed.), 432; Cowperthwaite v. Sheffield, 1 Sandf. 416.

[2] Friend v. Wilkinson, 9 Grat. 31; Neal v. Wyatt, 3 Humph. 125; Gindrat v. Mechanics' Bank, 7 Ala. 324; Hill v. Planters' Bank, 3 Humph. 670; Crocker v. Getchell, 23 Me. 392; Sussex Bank v. Baldwin, 2 Har. 487; Bank United States v. Goddard, 5 Mason, 366; Church v. Barlow, 9 Pick. 547; Colt v. Noble, 5 Mass. 167; Ogden v. Dobbin, 2 Hall, 112; Howard v. Ives, 1 Hill (N. Y.), 263; Butler v. Duval, 4 Yerg. 265; Worden v. Nourse, 36 Vt. 756; Bartlett v. Isbell, 31 Conn. 296; Mead v. Engs, 5 Cow. 303; Sheldon v. Benham, 4 Hill (N. Y.) 129; Eagle Bank v. Hathaway, 5 Metc. 213; Lawson v. Farmers' Bank, 1 Ohio St. 206; Langdale v. Trimmer, 15 East, 291; Daly v. Slater, 4 Car. & P. 200; Robson v. Bennett, 2 Taunt. 388; Scott v. Lifford, 9 East, 347; Byles on Bills (Sharswood's ed.), [*276], 428; Story on Bills (Bennett's ed.), 292. So far overruling Haynes v. Birks, 2 Bos. & P. 599.

[3] Bartlett v. Isbell, 31 Conn. 296.

[4] Clode v. Bayley, 12 M. & W. 51.

[5] Firth v. Thrush, 8 B. & C. 387 (15 E. C. L. R.); 2 Man. & Ry. 259. Lord Tenterden said: "A banker who holds a bill for a customer is not bound to give notice of dishonor on the day on which the bill is dishonored. He has another day, and upon the same principle I think the attorney in this case was entitled by law to be allowed a day to consult his client."

which of the prior parties his principal may desire to hold bound to him; or he may not know where notice would find them, as he has no interest in the bill or note, or privity with the parties, and the rule placing such agents on the footing of a distinct holder is essential to the convenient collection and management of negotiable paper.

The name of the party should be upon the bill or note, and a drawee who has not accepted, and who therefore is an entire stranger to the bill, is incompetent to give notice.[1]

§ 993. Sending the bill or note to a bank for collection implies authority to it to give notice, and in giving it, it may itself claim to be holder—or agent of the holder—or give it in the real holder's name.[2] Authority to collect a bill is authority to give notice.[3] A creditor holding the paper as collateral security[4] is a holder for the purposes of notice, and so also is he who accepts or pays *supra protest*.[5]

§ 994. *If the holder be dead*, his personal representative should give notice, if there be one; but if none be appointed at the time of maturity, the indorser will not be discharged if notice be sent him in a reasonable time after an appointment is made.[6]

SECTION IV.

TO WHOM NOTICE OF DISHONOR SHOULD BE GIVEN.

§ 995. Each indorser of a bill or note is entitled to notice, and so also is the drawer of a bill payable to a third party, as bills generally are. The acceptor of a bill and the maker of a note are not entitled to notice, they being the primary debtors.

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[1] See *post*, § 995; Chanoine v. Fowler, 3 Wend. 173; Brailsford v. Williams, 15 Md. 155; Stanton v. Blossom, 14 Mass. 116.

[2] Worden v. Nourse, 36 Vt. 757; Woodthorpe v. Lawes, 2 M. & W. 109; Edwards on Bills, 629.

[3] Worden v. Nourse, 36 Vt. 756.

[4] Peacock v. Purcell, 14 C. B. N. S. 728 (108 E. C. L. R.)

[5] Konig v. Bayard, 1 Pet. 262; Martin v. Ingersoll, 8 Pick. 1.

[6] White v. Stoddard, 11 Gray, 88; 1 Parsons N. & B. 444, 559.

The rule requiring notice to the indorsers of bills and notes extends to all indorsers, whether they are indorsers for value or mere agents for collection. A banking house,[1] or other agent,[2] merely passing title to the bill or note by indorsement for purposes of collection, stands on the same footing as any other indorser in respect to notice. "In regard to notice, each branch of a bank is considered a separate establishment."[3]

It is not sufficient in order to charge a prior indorser, to enclose notice for him to a subsequent one. Each successive indorser is entitled to notice, and overdiligence in notifying one will not supply the defect as to diligence in respect to another.[4] The transferrer of a negotiable instrument by delivery without making himself a party is not entitled to notice.[5]

§ 996. Although a bill or note is payable on demand, or has been indorsed long after it was due, there must still be a demand, and notice of default, in order to charge the indorser, because a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand.[6] This principle seems clearly correct, though it has

[1] McNeal v. Wyatt, 3 Humph. 125; Scott v. Lifford, 9 East, 347; Seaton v. Scovill, 18 Kansas, 435.

[2] Butler v. Duval, 4 Yerg. 265.

[3] Clode v. Bayley, 12 L. J. Exch. 17; 12 M. & W. 51; Thomson on Bills, 351; Edwards on Bills, 623.

[4] Stix v. Mathews, 63 Mo. 371; Brown v. Ferguson, 4 Leigh, 37; see *post*, § 1045.

[5] Van Wort v. Wooley, 3 B. & C. 439.

[6] Thompson v. Williams, 14 Cal. 162; Beebe v. Brooks, 12 Cal. 308; Colt v. Barnard, 18 Pick. 260; Bishop v. Dexter, 2 Conn. 419; Berry v. Robinson, 9 Johns. 121; Dwight v. Emerson, 2 N. H. 159; Greeley v. Hunt, 21 Me. 455; Kirkpatrick v. McCullough, 3 Humph. 171; Leavitt v. Putnam, 3 Coms. 494; Adams v. Torbert, 6 Ala. 865; Lockwood v. Crawford, 18 Conn. 361; Atwood v. Hazelton, 3 Bailey (S. C.), 457; McKinney v. Crawford, 8 Serg. & R. 351; Course v. Shackelford, 2 Nott & McC. 283; Branch Bank v. Gaffrey, 9 Ala. 153; 1 Parsons N. & B. 520; Hart v. Eastman, 7 Minn. 74; Jones v. Middleton, 29 Iowa, 188; Bemis v. McKenzie, 13 Fla. 557; Swartz v. Redfield, 13 Kansas, 550; see vol. 1, § 611.

Light v. Kingsbury, 50 Mo. 331, Adams, J., saying: "This is a negotiable note (payable one day after date), indorsed after due. Such indorsement is equivalent to drawing a new bill at sight, and the same diligence in making demand and giving notice is required to charge the indorsers."

been said that in such cases the party has a reasonable time within which to give notice,[1] and even that no notice at all is necessary.[2] In a recent case, where it was contended that the holder of a note, indorsed overdue, had a "reasonable time" to give notice, it was responded and held, that such "reasonable time" meant "immediate notice, which at farthest is the next day after default, where the parties reside in the same town."[3] In California, it has been held that the contract of one who indorses a note after maturity, and as additional security to prevent legal proceedings against the payee and indorser is that of a guarantor.[4]

§ 997. Where the indorsement upon the bill or note was made before its maturity, and after the bill or note had been transferred with it upon it, and had been returned to the indorser; and he, after paying it, and after the liability of all parties had been fixed, and re-issued it with their indorsements upon it, the general rule requiring demand of the maker, and notice to the indorser, where the indorsement was made after maturity, in order to charge the indorser, would not apply. For in such case the demand had been made, the notice given, and his liability determined before he re-issued the instrument. Thus, where the indorser, who had taken up a bill at maturity, and upon which his own and prior indorser's liability had been fixed by demand and notice, placed it in the hands of an auctioneer, who sold it to the plaintiff, it was held, that all the parties were bound without any new demand and notice, because there was no new contract of indorsement. And as to the indorser who put it upon the market bearing his name, such act was a representation of liability, and he was estopped in good faith and sound morals from denying it.[5] The like rule would

[1] Van Hoesen v. Van Alstyne, 3 Wend. 75.

[2] Gray v. Bell, 3 Rich. 71, O'Neall, J.; 1 Parsons N. & B. 519, note v.

[3] McKewer v. Kirtland, 33 Iowa, 352.

[4] Crooks v. Tully, 50 Cal. 255; Reeves v. Howe, 16 Cal. 152; Geiger v. Clark, 13 Cal. 579. But guarantor is entitled to notice of non-payment.

[5] St. John v. Roberts, 31 N. Y. 441 (1865); see also Williams v. Matthews, 3 Cow. 252.

apply where the indorser who has paid it re-issues an overdue note, bearing his name thereon, and himself persuades the indorsee to take it.[1] In general, the indorser who has paid and re-issues a note will be bound as a fixed indorser, or as one entitled to notice according to intention.[2]

§ 998. *Notice to the agent of the party* for the general conduct of his business is the same as if given to the principal in person.[3] But notice to the party's attorney or solicitor, unless he is specially authorized to receive it, is insufficient.[4] If an agent draw a bill in his own name, notice should be given to him, and if given to his principal it will be insufficient, he being no party to the paper.[5] If the paper be signed by a duly authorized agent in the principal's name, notice should be given to the principal, who is the party liable.[6] Whether or not the agent would be regarded as authorized to receive it, is questioned; and it has been decided that authority to indorse is not authority of itself to receive notice.[7] The mere fact that a party is the "financial agent" of his principal does not of itself constitute him an agent to receive notice.[8] An agent constituted before the breaking out of a war which severs him from his principal, with authority to receive notice of dishonor, may continue to act for that purpose; and notice served upon him will suffice to charge the indorser.[9] If a note be payable by installments, demand and notice as to the last installment binds the indorser as to that.[10]

§ 999. *In cases of partnership* notice must be given to the firm—but notice to any one partner is notice to the

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[1] Libby v. Pierce, 47 N. H. 314.

[2] Montgomery R. R. Co. v. Trebles, 44 Ala. 258.

[3] Cross v. Smith, 1 M. & Sel. 545; Wilkins v. Commercial Bank, 6 How. (Miss.) 217; Fassin v. Hubbard, 55 N. Y. 471.

[4] Louisiana State Bank v. Ellery, 16 Mart. (La.) 87; Cross v. Smith, 1 M. & Sel. 545.

[5] Grosvenor v. Stone, 8 Pick. 79. [6] Clay v. Oakley, 17 Mart. (La.) 137.

[7] Valk v. Gaillard, 4 Strob. 99; Wilcox v. Routh, 9 Sm. & M. 476.

[8] New York, &c. Co. v. Selma Savings Bank, 51 Ala. 305.

[9] Hubbard v. Matthews, 54 N. Y. 50. [10] Eastman v. Turman, 24 Cal. 383.

firm;[1] even though there has been a dissolution.[2] And it matters not that the firm was dissolved by war, and that one of the partners was separated from the other by a hostile line.[3] If an indorser be a member of the firm, the notice to the firm is sufficient.[4] The general rule, that notice to any partner is notice to the firm, is subject to this exception: that where one member resides at a distance, and another at the place of protest, notice must be given to the latter. At least, it has been so held.[5] If there are joint indorsers, not partners, notice must be given to each of them, and notice to one only would not even bind him.[6] But, "if the drawer of a bill," said the Supreme Court of the United States, "be in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer, need not be given. The knowledge of one partner is the knowledge of the other, and notice to the one notice to the other."[7] If one of a firm die, notice to the survivor suffices.[8]

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[1] Bayley, 285; Story on Bills, §§ 299, 305; Story on Notes, § 368; Chitty, 355; Gowan v. Jackson, 20 Johns. 176; People's Bank v. Keech, 26 Md. 521.

[2] Fourth National Bank v. Henschuh, 52 Mo. 207; Hubbard v. Matthews, 54 N. Y. 50; Brown v. Turner, 15 Ala. N. S. 832; Coster v. Thomason, 19 Ala. N. S. 717. See *ante*, § 592, vol. 1; Slocomb v. Lizardi, 21 La. Ann. 355.

[3] Hubbard v. Matthews, 54 N. Y. 50, Johnson, C.: "It results from necessity if the liability of the absent partner in a firm dissolved by the event of war is to be continued at all in respect to engagements existing at the time when war breaks out, that he must be deemed to be represented by the representative of the firm remaining within the jurisdiction of the belligerent whose authority extends over the place of business of the firm, and that as in respect to property and rights there existing, so in respect to obligations and liabilities dated before the war, he must share the fortunes of the firm."

[4] Rhett v. Poe, 2 How. 457.

[5] Hume v. Watt, 5 Kan. 34.

[6] Bank of U. S. v. Bierne, 1 Grat. 234; Hubbard v. Matthews, 54 N. Y. 50; People's Bank v. Keech, 26 Md. 521; Willis v. Green, 5 Hill, 232; Shepard v. Hawley, 1 Conn. 368; Boyd v. Orton, 16 Wis. 495; Dabney v. Stidger, 4 Sm. & M. 749; State Bank v. Slaughter, 7 Blackf. 133; Union Bank v. Willis, 8 Metc. 512; Bank of Chenango v. Root, 4 Cow. 126; Miser v. Trooinger, 7 Ohio St. R. 238; Bealls v. Peck, 12 Barb. 245; Sayre v. Frick, 7 W. & S. 383; Story on Bills, § 199; Wood v. Wood, 1 Har. 429; *contra*, Dodge v. Bank of Ky. 2 A. K. Marsh. 510; Higgins v. Morrison, 4 Dana, 100; Thomson on Bills, 361; Story on Notes, § 255, note 2. See *ante*, § 594, vol. 1.

[7] Rhett v. Poe, 2 How. 473.

[8] Hubbard v. Matthews, 54 N. Y. 50; Slocum v. Lizardi, 21 La. Ann. 355.

§ 1000. *If the party entitled to notice be dead* at the time the bill or note becomes payable, and this is known to the holder, notice should be sent to his executor or administrator, if there be any, and it can be ascertained by reasonable inquiry who or where he is; and under such circumstances notice addressed to the decease by name would be insufficient.[1] Notice addressed to the "legal representative," in such case, would suffice;[2] but it has been held that if addressed to "the estate," it would not, that term applying as well to the heir at law as to the executor or administrator.[3] Notice to one of several executors or administrators is sufficient.[4]

It is said, however, that in all these cases reception of notice by the personal representative in a reasonable time will be sufficient—curing all defects in the sending.[5] Where two promissory notes fell due at several times, and the indorser of both being deceased at their maturity, notice was given to the executor named in his will, who had presented

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[1] Oriental Bank v. Blake, 22 Pick. 206; Barnes v. Reynolds, 4 How. (Miss.) 114; Cayuga Co. Bank v. Bennett, 5 Hill, 236; 1 Parsons N. & B. 501, 502; Goodnow v. Warren, 122 Mass. 83.

[2] In Boyd's Adm'r v. City Savings Bank, 15 Grat. 501, it appeared that Boyd, the indorser of the note, was dead when it became due and was protested, and had no personal representative. He resided in Lynchburg at the time of his death, and his family continued to reside there until after the protest of the note. Notice of dishonor was on the day of protest deposited by the notary in the post-office at Lynchburg, directed to "The Legal Representative of James M. Boyd, deceased, Lynchburg;" and this was all the notice given. The Court of Appeals held that the notice was sufficient, saying that the legal representative (upon his qualification) was as likely to receive notice through this channel as if it had been left at the late residence of the deceased indorser; and that the former was preferable, inasmuch as "the family of the deceased, at the time of the protest, might be in a state of deep affliction (occasioned by his recent death), when it would be painful both to them and the notary for him to have to visit them on a matter of business." Pillow v. Hardeman, 3 Humph. 538; Planters' Bank v. White, 2 Humph. 112. See *post*, § 1011, p. 58, note 2.

[3] Cayuga County Bank v. Bennett, 5 Hill, 236; Massachusetts Bank v. Oliver, 10 Cush. 557.

[4] Beals v. Peck, 12 Barb. 245; Lewis v. Bakewell, 6 La. Ann. 359.

[5] Cayuga County Bank v. Bennett, 5 Hill, 236; Maspero v. Pedesclaux, 22 La. Ann. 227; 1 Parsons N. & B. 502.

it for probate; before the maturity of the second note the executor had renounced the executorship, and an administrator had been appointed, but no public notice of the fact had been given—it was held that notice as to the first note was sufficient, but not as to the second.[1] In a case where no personal representative of a deceased indorser had been appointed, notice left at his residence with his son-in-law was deemed sufficient.[2] Notice sent to a person who was afterward appointed administrator of the deceased has been held insufficient, on the ground that he occupied no such relation to the estate at the time of its reception, that he was either honorably or in legal duty bound to do anything for its protection.[3]

§ 1001. *If there be no personal representative*, notice sent to the family residence of the deceased will be sufficient;[4] and it is likewise sufficient if notice be addressed to the deceased when, without negligence, the holder is not aware of his death.[5] If notice is left at the family residence, no personal representative having been appointed, it will not be necessary, when one is appointed, to give him notice, the rights of the holder being fixed by his doing what the circumstances required when the paper fell due.[6]

§ 1002. *If the party be bankrupt*, it is best to give notice to him, and to his assignee also. If there be as yet no assignee appointed, notice to him is sufficient;[7] and perhaps it might be sufficient even if one had been appointed.[8] If given to the assignee alone, it would probably be sufficient.

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[1] Goodnow v. Warren, 122 Mass. 79.

[2] Weaver v. Penn, 27 La. Ann. 129.

[3] Mathewson v. Strafford Bank, 45 N. H. 104. See Goodnow v. Warren, 122 Mass. 82.

[4] Merchants' Bank v. Birch, 17 Johns. 25; Stewart v. Eden, 2 Caines, 121; Goodnow v. Warren, 122 Mass. 82. Devens, J.: "It has been held that if notice be sent to the last residence, or last place of business of the deceased, it is sufficient to render his estate responsible, as it may be reasonably supposed that it will thus reach those interested in it." Linderman v. Guldin, 34 Penn. St. 54.

[5] Barnes v. Reynolds, 4 How. (Miss.) 114; Maspero v. Pedesclaux, 22 La. Ann. 227.

[6] Merchants' Bank v. Birch, 17 Johns. 25.

[7] *Ex parte* Moline, 19 Ves. 216.

[8] 1 Parsons N. & B. 500.

If the bankrupt has absconded, notice should be given his assignee, if any there be;[1] and if there be none, to any one representing his estate.[2]

SECTION V.

MODE AND FORMALITIES OF GIVING NOTICE WHEN THE PARTY GIVING AND THE PARTY TO RECEIVE IT RESIDE IN THE SAME PLACE.

§ 1003. If the party addressed receives the notice, or it can be properly inferred by the jury from the facts of the case that it was received, the mere manner of its transmission is wholly immaterial.[3] A personal service of notice is good wherever it may be made, provided it be done in proper time; at an improper place it is sufficient if it reaches the party for whom it was intended in due season;[4] and so likewise if it be sent by mail where the parties reside in the same place, it is good if it duly reaches the party addressed.[5]

The distinction between the different modes of giving notice is this: that where the holder and indorser reside in different places, the former, if he deposits the notice in the post-office in due season, has no further burden on him as to the actual receipt of it by the latter; but where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season.[6]

§ 1004. The telegraph, as yet unemployed in transmitting notice of dishonor of commercial paper, might be made

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[1] Rhode v. Proctor, 4 B. & C. 517; 6 Dow. & R. 610. [2] Ibid.

[3] Hyslop v. Jones, 3 McLean, 69. See *ante*, § 1000.

[4] Bank of United States v. Corcoran, 2 Pet. 121; Foster v. McDonald, 5 Ala. 376; Manchester Bank v. Fellows, 8 Fost. (N. H.) 302; Whiteford v. Burckmeyer, 1 Gill, 127; Bradley v. Davis, 26 Me. 45; Cabot Bank v. Warner, 10 Allen, 524; Shelburne Nat. Bank v. Townsley, 107 Mass. 444; Gilchrist v. Downell, 53 Mo. 591.

[5] Ibid.

[6] Cabot Bank v. Warner, 10 Allen, 522.

available and useful for that purpose;[1] but the proof of its due reception would be necessary, as communication by that channel does not stand on the same footing as that by mail.

If a system of postal telegraphy were established by the government (as is proposed), it would doubtless be placed in equal dignity with the mail service, and then become frequently, if not generally, the medium of communicating notice. Notice may also be sent by special messenger, as we shall see hereafter. We shall herein consider (1) When notice must be personally served; and (2) How and where it must be personally served.

§ 1005. *In the first place, when notice must be personally served.*—When the parties reside in the same city or town, the party is, as a general rule, entitled to personal notice, verbal or written, or a written notice must be left at his dwelling-house or place of business. And notice by mail in such a case will be insufficient,[2] unless its reception in due time be proved;[3] but if the instrument was protested by a notary at a place different from that of the parties' residence, the mail may then be used.[4] And the notice may be deposited in the post-office at the place of protest, or at the place of the indorser's residence, if in due season.[5]

This at least is the rule in America, and may be regarded as the law in all of the States, except where it has been changed by statute, or some modification has been made by the courts in consequence of the growth of large cities.

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[1] 1 Parsons N. & B. 487.

[2] Bowling v. Harrison, 6 How. 248; Williams v. Bank U. S. 2 Pet. 96; Bussard v. Levering, 6 Wheat. 104; Nashville Bank v. Bennett, 1 Yerg. 166; Boyd v. City Savings Bank, 15 Grat. 501; Pierce v. Pendar, 5 Metc. 352; Shelburne Falls National Bank v. Townsley, 102 Mass. 177; Story on Bills, § 312; 1 Parsons N. & B. 482; Byles on Bills (Sharswood's ed.) [*272], 422; Vance v. Collins, 6 Cal. 535; Kock v. Bringer, 19 La. Ann. 183; Davis v. Gowen, 19 Me. 447.

[3] Cabot Bank v. Warner, 10 Allen, 524.

[4] Hartford Bank v. Stedman, 3 Conn. 489; Manchester Bank v. Fellows, 8 Fost. 302; Warren v. Gilman, 17 Me. 360; Greene v. Farley, 20 Ala. 322; Eagle Bank v. Hathaway, 5 Metc. 212.

[5] Foster v. McDonald, 8 Ala. 376; Timms v. Delisle, 5 Blackf. 447; *contra*, M'Crummen v. M'Crummen, 17 Mart. (La.) 158; Patrick v. Beasley, 6 How. (Miss.) 609; Greene v. Farley, 20 Ala. 322.

Thus it has been held that where a bill was dishonored in Philadelphia, and notice sent to an indorser in Providence, the latter might give notice to a previous party residing in Providence, through the post-office.[1] And so where the notary, sending notice to one indorser, inclosed to him under the same envelope a notice for him to give to a prior indorser at the same place, it has been held that the notice for such prior party might be redeposited in the post-office properly addressed, the first indorser being regarded as the agent of the notary or holder who might, if he had pleased, have sent the notice directly by mail.[2] And so where the notary, who protested the bill at Middletown where it was payable, sent notice to the holder who resided, as did also the indorser, at Hartford, and the holder there redeposited it in the post, it was held sufficient.[3]

§ 1006. When, however, an indorser uses the post-office to communicate notice to a prior indorser in the same place as himself, he must expedite it by mail in time for it to reach him as early as if it had been addressed to him originally from the place of protest, and had not been withdrawn from the office at all. In Massachusetts, where it appeared that the note was protested in New York City on the 7th of July, 1866, and the notices were inclosed to the first indorser at Shelburne Falls where they reached him in due course on the 10th inst.; and he redeposited the notice for his immediate prior indorser, who also received his letters through the Shelburne Falls office (though residing in the country), in the post-office there on the 11th inst.; it was held that due dili-

[1] Eagle Bank v. Hathaway, 5 Metc. 213; Shaw, C. J., saying; "On the whole, as the transaction to be notified to the defendant took place in Philadelphia; as notice to him by mail from there would have been good; as the cashier was the conduit of conveyance, and not the party from whom the notice emanated; as the defendant, if he were looking for notice of the dishonor of this bill of exchange payable in Philadelphia, would naturally look to the post-office for that notice, we are of opinion that notice by the post-office under these circumstances must be deemed good."

[2] Manchester Bank v. Fellows. 8 Fost. 313.

[3] Hartford Bank v. Stedman, 3 Conn. 489.

gence had not been exercised, and the prior indorser was discharged.[1]

§ 1007. Where the parties do not themselves reside at the same place, but the note is payable at the same place where the party to be notified resides, the like rule prevails as if the parties resided there. Thus, where a note was payable at Vicksburg, Mississippi, and the holder resided in Maryland, but the indorser resided in Vicksburg, the Supreme Court of the United States held that the indorser could not be notified through the post-office in Vicksburg, and sustained the charge of the lower court to the jury, "that to charge an indorser, if he lived in the town in which the note was made payable, the notice must be personal unless he had agreed to receive it elsewhere, or unless by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the post-office."[2] But the opposite view has been taken in some cases.[3]

§ 1008. *Use of the penny post.*—There is an exception to the general rule requiring personal service of notice when the parties reside in the same place, or rather a variation of the general rule, in large towns and cities where letter carriers are employed in the postal service to deliver letters at the houses or places of business of parties who usually receive their letters through them. In such cases, if the notice be deposited in the post-office early enough in the day to go by

[1] Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177. Ames, J., distinguished the case from that of Eagle Bank v. Hathaway above cited, and said: "That case, however, differs from the one before us, in showing that the notification was left by the cashier at the post-office on the day of its reaching his hands, and that it must have reached the defendant as early as if it had been directed and sent to him by mail from Philadelphia; so that substantially he was notified by the notary in regular course of mail. But considered as an independent notice, emanating from an indorser who, by being himself properly notified, has become chargeable, and desires to notify his immediate indorser, and thereby to hold him, a notice by a drop-letter, given on the next day, finds little or no support in that case." See, also, 107 Mass. 444.

[2] Bowling v. Harrison, 6 How. 248; see also Bank v. Slaughter, 7 Blackf. 133.

[3] Gindrat v. Mechanics' Bank, 7 Ala. 324; Greene v. Farley, 20 Ala. 324; Philipe v. Harberlee, 45 Ala. 608; Tyson v. Oliver, 43 Ala. 608.

the letter carrier (or penny post, as this system is often called), on the same day to the party entitled to notice, it will be deemed sufficient. In such cases, the penny post, or letter carrier, is treated as an agent for the purpose, because of the accustomed use of this agency as a medium of city communication. It was recently said in Pennsylvania, where notice was sent in this manner in the city of Harrisburg, by Read, J.: "Now that free delivery of letters is established and regulated by law so as to secure a certain delivery according to its address, it seems proper that this rule should be adopted in this State as called for by the improvements introduced into the post-offices by the general government."[1]

So in Maryland, where the carrier testified that he uniformly delivered letters for the indorser to him, and the penny post was regularly established, the same doctrine was held.[2]

§ 1009. It must be proved, when the penny post is used, that the letter containing notice was deposited in the post at such a time that, according to the course of the post, it would be delivered to the party to whom it is addressed on the day he was entitled to receive notice of dishonor;[3] and it has been said by high authority, that if there be no penny post that goes to the quarter where the drawer lives, the notice must be personal, or by special messenger sent to his dwelling-house or place of business.[4] But if the party re-

[1] Shoemaker v. Mechanics' Bank, 59 Penn. St. 83 (1868).

[2] Walters v. Brown, 15 Md. 292 (1859). In Virginia, it is now provided by statute that "in every city containing five thousand inhabitants or more, a notice of protest of any note, draft, and so forth, sent by mail to any party or parties residing therein, and liable thereto, shall be a legal service." See Acts of Assembly, 1876-7, p. 28. In Greenwich Bank v. De Groot, 14 N. Y. S. C. (7 Hun), 211, the Court speaking of the N. Y. Statute says: "That law requires the notice to be deposited in the post-office of the city or town where the paper may be payable or legally presented for payment or acceptance (chap. 466, Laws of 1857, § 3). And these boxes, by a liberal construction of the terms of the statute, may be regarded as the post-office for that purpose."

[3] Smith v. Mullet, 3 Camp. 208; Dobree v. Eastwood, 3 Car. & P. 250; Walters v. Brown, 15 Md. 292.

[4] 3 Kent Com. 107.

sides beyond the city limits, while the penny post might not be used, because unavailable, yet the regular post might be, according to the modern and the correct view, as it seems to us.

§ 1010. In London and in Edinburgh where the facilities of postal delivery have been long since perfected, the use of the post-office for communicating notice to parties in the city has been recognized and favored as the legitimate and proper method.[1] And the modern authorities show a disposition to extend and encourage it. It has been said that the requirement that notice should be sent otherwise than by post "has lost its reasonable force, and exists only by authority."[2]

§ 1011. Another exception to the rule requiring personal notice when the parties reside in the same place arises when the party entitled to notice has recently died, and no personal representative has been appointed. In such a case, where notice was deposited addressed "to the legal represenative of J. M. B." (the deceased indorser), at the place of the indorser's late residence, where the holder also resided, it was held sufficient.[3]

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[1] 1 Parsons N. & B. 481; Thomson on Bills, 339.

[2] 1 American Lead. Cas. 403; Redfield and Bigelow's Lead. Cas. 381; 1 Parsons N. & B. 484; Eagle Bank v. Hathaway, 5 Metc. 212.

[3] Boyd's Adm'r v. City Savings Bank, 15 Grat. 501 (1860), Moncure, J., saying: "Two modes of giving it naturally suggested themselves; one by sending it through the post-office, and the other by leaving it at the last residence of the indorser, where his family still resided in the same town; and the notary elected the former. Was it not a reasonable choice? Was it so unreasonable as to defeat the right of the holder against the estate of the indorser? No unnecessary restraint should be imposed on the circulation of negotiable paper. No difficult condition should be required to be performed to fix the liability of parties. What was the notary to do under the circumstances of this case? He could not deliver the notice to the personal representative himself, who was the person entitled to receive it, but who was not then known and had not qualified. All he could do was to put it in a train of being received by the personal representative in a reasonable time after his qualification. He might have left it at the last residence of the indorser, as the cases decide; but that would only have been a means of conveying it to the personal representative after his qualification. The notice is not to the family, but to the personal representative, who stands in the

§ 1012. So, likewise, where there are several distinct villages or post-offices in a town, between which there is a regular intercourse by mail, it may be employed for the conveyance of notice, notwithstanding the fact that the parties reside in the same general municipality.[1]

And where the indorser resided in the same city, but ten miles from the place of protest, it has been held allowable to use the post, there being at his place of residence an office at which it was not shown that he did not receive his mail.[2]

§ 1013. The usage of a bank to deposit notice in the post-office, it has been held, would be binding upon those dealing with it.[3] But it should be proved with certainty and clearness.[4]

§ 1014. *As to who are to be regarded as of the same place.*—According to one class of cases all persons are to be

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shoes of the indorser. Then, as a means of conveying it to the personal representative, is not the post-office at least as good a place of deposit as the last residence of the deceased?"

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"The reason for requiring notice, in the case of a living indorser, to be left at his domicile or place of business rather than at the post-office, does not apply to the case of a deceased indorser who is without a representative. In the former case, the law presumes that the indorser is always at his domicile or place of business, or has some person there to attend to his business; and a notice left there is considered to be at home, and as having in effect been personally served. In the latter case, no such presumption can be made. A notice left at the domicile of a deceased indorser for his representative, when one qualifies, is not at home, but is merely *in transitu*, and so is a notice left at the post-office for such representative.

"If notice given through the post-office would be just as effectual as notice left at the last residence of the indorser, there is one reason at least which would make the former preferable, and which was mentioned in the argument of the counsel for the defendant in error; and that is, the family of the deceased at the time of the protest might be in a state of deep affliction (occasioned by his recent death), when it would be painful both to them and the notary for him to have to visit them on a matter of business."

[1] Shaylor v. Mix, 4 Allen, 351; Farmers' Bank v. Butler, 3 Litt. 498; Curtis v. State Bank, 6 Black, 312; Brindley v. Barr, 3 Harr. (Del.) 419; Gist v. Lybrand, 3 Ohio, 307; Louisiana State Bank, v. Rowel, 18 Mart. (La.) 506; Bell v. Hagerstown Bank, 7 Gill, 216.

[2] Paton v. Lent, 4 Duer, 231.

[3] Gindrat v. Mechanics' Bank, 7 Ala. 324; Chicopee Bank v. Eager, 9 Metc. 583; 1 American Lead. Cas. 403.

[4] Thorn v. Rice, 15 Me. 263.

regarded as of the same place who receive their mails through the same post-office; and although the party entitled to notice may in fact have his residence several miles distant in the country, those cases do not admit the post-office in the city or town where he gets his mail matter, and where the holder is to be used as a means of communicating notice. They base the decision upon the doctrine that the mail is to be used as a means of transmission only, and not as a place of deposit.[1]

Thus, in Tennessee, it was held that where notice of protest in Nashville, where the note was payable, was mailed there to the indorser, who resided seven and a half miles distant, was not sufficient, although he transacted his business at Nashville and received his mails there.[2] So in New York, where the indorser resided three or four miles from the post-office, and beyond the ordinary range of letter carriers, but in the same city, and received his letters at the same office where notice was deposited, the same doctrine was announced, though the case did not present the question as to an indorser actually residing beyond the city limits in the country.[3]

§ 1015. But where the party has no regular place of business in the city or town where the holder resides or the instrument is payable, and resides some distance in the country, but receives his mails in the city or town, the mere fact that he would get the letter out of the same office it was put in, instead of a distant one, should not vitiate the method of communication, every reason of convenience and certainty which apply in one case applying with equal force in the other.

[1] In Shelburne Falls National Bank v. Townsley, 102 Mass. 177, it is said: "The post-office is not a place of deposit for notice to indorsers, except where the notice is to be transmitted by mail to another office." Farmers' Bank v. Battle, 4 Humph. 86. See also Eagle Bank v. Hathaway, 5 Metc. 212; Ransom v. Mack, 2 Hill, 587; Ireland v. Kip, 10 Johns. 490; 11 Johns. 231; Louisiana State Bank v. Rowel, 6 Mart. 506; Barker v. Hall, Mart. & Yerg. 183; Patrick v. Beazley, 6 How. (Miss.) 609.

[2] Barker v. Hall, Mart. & Yerg. 183.

[3] Ireland v. Kip, 10 Johns. 490; 11 Johns. 231; Edwards on Bills, 602.

The Supreme Court of the United States has adopted this view in preference to the more exacting view of the authorities referred to; and has held that where the plaintiff bank at which the note was payable was located in Georgetown, and the indorser, when the note fell due, resided two or three miles distant in the country, having removed after it was made from Washington city, but received his letters through the Georgetown post-office, notice deposited in the Georgetown post-office, addressed to him at that place, was sufficient.[1]

[1] In the case of Bank of Columbia v. Lawrence, 1 Pet. 578, the Court (Thompson, J.), said: "The indorser, who had removed to the country from Washington, as stated in the text, continued the owner of the house in Washington in which he had formerly lived, and which was in the occupation of his sister-in-law. He was accustomed to go there two or three times a week; and it appeared that he was employed in winding up his business there, and settling accounts; that his books were kept there; and his bank notices were sometimes left there; and also that his newspapers and foreign letters were sent there for him. His coming to Washington and employing himself as stated, was generally known to those having business with him." It was contended that notice should have been sent to Washington by the plaintiff's bank located at Georgetown; but the court thought the method adopted the proper one; and Thompson, J., said: * * * "If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place would not be equally good. Parties may be, and frequently are, so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business carried on, but merely occasional employment there two or three times a week in a house occupied by another person, and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good, the defendant residing in the country two or three miles distant from that place, in the county of Alexandria. The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance; and, whether the notice reaches the party or not, the holder has done all that the law requires of him. It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence in a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable and

The opposite view is severe and technical, and does not rest, that we perceive, upon any principle of convenience, util-

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founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being the usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resided in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence. In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual course of receiving letters, which must determine sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The latter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the court which have suggested any limits to the distance from the post-office within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred where the distance was much greater than in the one now before the court, and the notice held sufficient. 16 Johns. 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special

ity or justice. And the authorities, which are numerous, concurring in the opinion expressed by the United States Supreme Court commend themselves to approbation.[1] It has

messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say that no such cases can arise, but they will seldom, if ever, occur; and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expense of serving notice by a special messenger. The case of Pearson v. Crallan, 2 Smith, 404; Chitty, 222, n., is one of this description. But in that case, the court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases; but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay is at least very questionable. We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury. Judgment reversed, and *venire facias de novo* awarded."

[1] Walker v. Bank of Augusta, 3 Kel. 486; Bank United States v. Norwood, 1 Harr. & J. 423; Gist v. Lybrand, 3 Ohio, 307; Carson v. Bank of Alabama, 4 Ala. 148; Jones v. Lewis, 8 Watts & S. 14; Timms v. Delisle, 5 Blackf. 447; Bell v. State Bank, 7 Blackf. 457; Foster v. Smeath, 2 Rich. 338; Walker v. Bank of Missouri, 8 Mo. 704; Barrett v. Evans, 28 Mo. 323; Bondurant v. Everett, 1 Mete. (Ky.) 658, decided in 1858 (overruling Farmers' Bank v. Butler, 3 Litt. 498, decided in 1823). In this case the bill was payable at Mount Sterling, Ky., and the drawer lived two or three miles from that place. It was protested, and notices deposited in the post-office at Mount Sterling, addressed to the indorser at Cincinnati and to the drawer at Mount Sterling. The Court held it sufficient, and, overruling the case above referred to, said: "A great change has occurred in the business and condition of the commercial world since 1823, when the case in 'Littel' was decided. Facilities for the transmission of intelligence from point to point have been increased; new and more convenient postal arrangements have been effected, and, in consequence thereof, conveyance of letters by private hand has been almost abandoned. Persons resident in the same town or city frequently communicate with each other through the post-office in such place, because it is now the legal duty of postmasters to deliver such letters, which was not the case in 1823. Almost every person residing near a post-office resorts there regularly for his letters, as is shown to have been the case with Bondurant here. And it is rendered reasonably certain that he must have received the notice deposited in the office by the notary at an earlier day than he could have obtained it if sent to Cincinnati and returned."

been justly said that the corporate limits of the city define the limits as to the requirement of personal notice.[1]

Where a prior indorser resided in Frankfort, Ky., and the bill was there protested and notice sent to the holder at Shelbyville, and then transmitted to the indorser at Frankfort, by mail, it was held insufficient under the Kentucky statute.[2]

§ 1016. *In the second place, how and where notice must be personally served.*—If the notice is to be given to a party to whom it is not necessary or allowable to transmit it by mail, it should be sent to or given at his place of domicile or place of business, and delivery of notice at either will be sufficient,[3] even when they are in different towns.[4] When the party keeps a counting-room or other business place, and has a private residence also, it is usual to send notice to the place of business rather than to the dwelling, and if notice is so sent to his place of business during hours when he or some of his people might be reasonably expected there, it is sufficient; it is not necessary to leave a written notice, or to send

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[1] Barrett v. Evans, 28 Mo. 323.

[2] Todd v. Edwards, 7 Bush. (Ky.), 93; Peters, J.: "As to the manner of giving notice of the dishonor of a bill, that subject is in many States of the Union regulated by special statute; but where there is no statutory regulation the rule seems to be that where the party to be charged resides in the same city or town where the bill is to be presented and demand made, notice must be personal, or left at his dwelling-house or place of business. Edwards on Bills and Notes, 456.

"By an act of the legislature of this State, approved January 16, 1864 (Myer's Supplement, 354), it is made the duty of notaries public, upon protesting bills of exchange, etc., to give or send notice of the dishonor of such paper to such parties thereto as are required by law to be notified, to fix their liability on such paper; and when the residence of any such parties is unknown to the notary public, he shall send the notices to the holder of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and the manner of giving the same, and such statement in such protest shall be *prima facie* evidence that such notices were given or sent as therein stated by such notary."

[3] Story on Bills, § 297; 3 Kent Com. 106; 1 Parsons N. & B. 488, 489; Ireland v. Kip, 10 Johns. 491; Van Vechten v. Pruyn, 3 Kern. 549; Bank of Columbia v. Lawrence, 1 Pet. 578; Williams v. Bank U. S. 2 Pet. 96; Sanderson v. Reinstadler, 31 Mo. 483; Nevins v. Bank, 10 Mich. 547; Grinman v. Walker, 9 Iowa, 426.

[4] Bank of Geneva v. Howlett, 4 Wend. 328; Donner v. Remer, 21 Wend. 10.

to the house where he lives, it being considered that he has dispensed with notice.[1] This has been doubted, and while the law is to this effect, in our judgment, it might be safer to send the notice to the residence when no one is found at the place of business.[2]

If the indorser holds out by his course of conduct in the transaction that a certain place is his place of business, it is sufficient if notice be sent there.[3]

When the party has two or more places of business in the same town, the holder may send notice to either.[4]

§ 1017. *Notice left with a clerk at the party's place of business in his absence*,[5] or at his place of business, without proof as to the person with whom it was left,[6] is sufficient, and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place.[7] So leaving it with his private secretary at his public office is sufficient.[8]

If the party be not found at his dwelling, it is sufficient to leave notice with his wife,[9] or with any other person on his premises.[10] A verbal message left at the party's house with his wife has been held sufficient,[11] and the certificate of

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[1] Bayley on Bills, p. 176; Crosse v. Smith, 1 Maule & S. 545; Goldsmith v. Blane, 1 Maule & S. 554; Bancroft v. Hale, Holt, 476; Allen v. Edmundson, Car. & K. 547; Story on Bills, § 300; Byles on Bills (Sharswood's ed.), [*273], 423; Lord v. Appleton, 15 Me. 579; State Bank v. Hennen, 16 Mart. (La.) 226; Thomson on Bills, 337.

[2] 1 Parsons N. & B. 488.

[3] Berridge v. Fitzgerald, L. R. 4 Q. B. 641 (1869).

[4] Phillips v. Alderson, 5 Humph. 403; Commercial Bank v. Strong, 28 Vt. 316.

[5] Edson v. Jacobs, 14 La. 494; Commercial Bank v. Gove, 15 La. 113.

[6] Bank of Louisiana v. Mansaker, 15 La. 115; Mechanics' Banking Association v. Place, 4 Duer, 212.

[7] Jacobs v. Town, 2 La. Ann. 964.

[8] Merz v. Kaiser, 20 La. Ann. 377.

[9] Blakely v. Grant, 6 Mass. 386; Fisher v. Evans, 5 Bin. 542.

[10] Cromwell v. Hynson, 2 Esp. 511; Housego v. Cowne, 2 M. & W. 348.

[11] Housego v. Cowne, 2 M. & W. 348, in which Bollana, B., said: "A person not a merchant who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due."

the notary, "left at his house at ———," would answer the requirements of the law.[1]

§ 1018. A room where a party is accustomed to resort, but where he carries on no trade or employment, is not his place of business;[2] and it has been held that the fact that the indorser occupied a room in another's house for settling up his former business, and there kept his books of account, and received his correspondence, did not constitute it his place of business.[3] It will not be sufficient merely to leave notice in the building in which the party transacts business —it must be at his very place of business[4]—not to leave it at the store of the son of the indorser—the latter residing in the same building, but having his usual place of business elsewhere.[5] If the dwelling or chamber occupied by the indorser were closed, and he had left the place, it would be useless and unnecessary to proceed further.[6]

§ 1019. If the party lodge at a private boarding-house, it is to all intents and purposes his dwelling; and if notice be delivered there to the proprietor, or to a servant of the house, or to a fellow-boarder in the absence of the party himself, it is sufficient.[7] If the party lodge at a public

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[1] Adams v. Wright, 15 Wis. 408, but it was held in this case that proof that notice was left with a boy in the yard, who said that he was the indorser's son, and who went toward the house, was insufficient.

[2] Stephenson v. Primrose, 8 Port. (Ala.) 155.

[3] Bank of Columbia v. Lawrence, 1 Pet. 578.

[4] Kleinman v. Boernstein, 32 Mo. 311.

[5] Bank of U. S. v. Corcoran, 2 Pet. 121, in which case the Court said: "The store of the son was as distinct and separate from the father as if they had been under different roofs. The former was entered from the street, the latter from an alley or passage; and it does not appear that there was any inside communication between the two. * * The service of the notice was no more a compliance with the requisition of law than if it had been delivered to the son in the street or elsewhere, or left at his dwelling-house."

[6] Howe v. Bradley, 19 Me. 35.

[7] Bank U. S. v. Hatch, 6 Pet. 250, in which case the Court said: "This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform

house, and the notary, after inquiry, learns that he is not in, it will suffice to leave notice at his room or at the door of his room;[1] and it seems that it will suffice to leave notice for a guest at a hotel with the bar-keeper or other attendant.[2] But in all cases the guest should be inquired for first. If it do not appear that he was really at the hotel, or that the notary inquired for him, or left notice with some competent person for him, the defect would be fatal.[3] It would not suffice to leave notice with another guest at a hotel.[4]

SECTION VI.

MODE OF SERVING NOTICE WHEN THE PARTY GIVING AND THE PARTY TO RECEIVE IT RESIDE IN DIFFERENT PLACES.

§ 1020. The usual mode of serving notice when the parties reside in different places is by mail. But in some cases a special messenger is employed. We shall consider the service by mail and by messenger consecutively: (1) How, when and whereto notice may be transmitted by mail; and (2) When special messenger may be employed.

§ 1021. *In the first place, how, when and whereto notice may be transmitted by mail.*—When the parties reside in different places, or the party entitled to notice resides at a place other than the particular place at which the bill or note is payable, it will, in general, be sufficient for the holder to put notice of dishonor in the post-office, addressed to the party entitled thereto, within the proper time. This done, his duty is discharged, and it is not necessary that the notice should be received—the holder not being responsible for any miscarriage of the mail.[5]

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punctually such common duties of life as this. See also Stedman v. Gooch, 1 Esp. R. 4; McMurtrie v. Jones, 3 Wash. C. C. 206; Miles v. Hall, 12 Sm. & M. 332.

[1] Howe v. Bradley, 19 Me. 31.

[2] Bradley v. Davis, 26 Me. 45; Dana v. Kemble, 19 Pick. 112; Graham v. Sangston, 1 Md. 59.

[3] Ashley v. Gunton, 15 Ark. 415. [4] Bank U. S. v. Hatch, 6 Pet. 250.

[5] Farmers' Bank v. Gurnell, 26 Grat. 137; Bussard v. Levering, 6 Wheat. 102;

§ 1022. *To what post-office notice should be directed when sent by mail.*—The notice should be directed to the post-office at, or nearest to, the party's place of residence, unless he is accustomed to receive his letters at another post-office, in which case it should be directed thereto.[1] If he live at one place and has his place of business at another, notice may be sent to either;[2] and the place where the party actually resorts to for his letters is always the appropriate one, when known, for notice to be addressed to, whether or not the party lives there or has there his place of business.[3] If the place be that of his actual residence at the time, it need not be his domicile.[4]

§ 1023. The indorser has a right to direct to what postal address, or to what place, notice shall be sent, and it will always suffice to pursue his direction although he may have a place of residence or business elsewhere.[5] Sometimes the place to which he desires notice to be sent is designated by memorandum on the instrument, as, for example, by writing the words "214 E. 18th street,"[6] or by adding his address to his signature, as for instance, "Memphis, Tenn.,"[7] or "Walnut Bend, Arkansas,"[8] or "13 Chambers street, New York,"[9]

Lindenberger v. Beall, 6 Wheat. 104; Munn v. Baldwin, 6 Mass. 316; Cabot Bank v. Warner, 10 Allen, 524; Shelburne National Falls Bank v. Townsley, 102 Mass. 177; Miller v. Hackley, 5 Johns. 375; Ellis v. Commercial Bank, 7 How. (Miss.) 294; Friend v. Wilkinson, 9 Grat. 31; Sanderson v. Judge, 2 H. Black. R. 509; Woodcock v. Houldsworth, 16 M. & W. 126; Chitty on Bills, 658; Story Prom. Notes, § 328; Story on Bills, § 300; 1 Parsons N. & B. 478; Byles on Bills (Sharswood's ed.) [* 270], 418; Thomson on Bills, 338; Parker v. Gordon, 7 East, 385; Kufh v. Weston, 3 Esp. 54.

[1] Bank of Columbia v. Lawrence, 1 Pet. 582; Bank of Geneva v. Howlett, 4 Wend. 328; Mercer v. Lancaster, 5 Barr, 160; Jones v. Lewis, 8 W. & S. 14.

[2] Bank U. S. v. Carneal, 2 Pet. 549; Williams v. Bank U. S. 2 Pet. 96; Cuyler v. Nellis, 4 Wend. 398; Reid v. Payne, 16 Johns. 218; Montgomery Co. Bank v. Marsh, 3 Seld. 481.

[3] See *ante*, note 5, p. 70; 1 Parsons N. & B. 498, and cases cited.

[4] Young v. Durgin, 15 Gray, 264.

[5] Eastern Bank v. Brown, 17 Me. 356; Crowley v. Barry, 4 Gill, 194; Bell v. Hagerstown Bank, 7 Gill, 216; Bank of Columbia v. Magruder, 6 Har. & J. 172; Carter v. Union Bank, 7 Humph. 548; Tyson v. Oliver, 43 Ala. 455.

[6] Bartlett v. Robinson, 39 N. Y. 187; see also Davis v. Bank of Tennessee, 4 Sneed, 390.

[7] Carter v. Union Bank, 7 Humph. 548.

[8] Peters v. Hobbs, 25 Ark. 67.

[9] Morris v. Husson, 4 Sandf. 93.

or "W. Moors, Manchester,"[1] or "T. M. Barron, London,"[2] and he thereby impliedly directs notice to be sent to the place designated.[3]

§ 1024. It is not sufficient to direct notice generally to a parish, county or township within which there are a number of post-offices;[4] but it has been held that it was sufficient to direct notice to the party at the shire town of the county, although there was a post-office nearer to him which he was in the habit of using.[5] Where there are two post-offices in the town where the party resides, notice may be directed to the town generally, unless the holder knows, or should know, that he receives his letters at one of them, in which case notice should be directed there.[6] It has been held that in London delivery of a letter to a bellman in the street is not equivalent to a deposit in the post-office,[7] but this doubted.[8]

§ 1025. If the party live in one place and have his place of business at another, the holder of a bill or note protested at a third place, should send notice to the place at which he usually receives his letters;[9] but if the holder does not

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[1] Mann v. Moors, Ryan & M. 149. [2] Burmester v. Barron, 17 Q. B. 828.

[3] See also Baker v. Morris, 25 Barb. 138; Davis v. Bank of Tennessee, 4 Sneed, 390; Farmers' Bank v. Battle, 4 Humph. 86.

[4] Beenel v. Tournillon, 6 Rob. (La.) 500.

[5] Weakly v. Bell, 9 Watts, 273; Story on Bills, § 297; 1 Parsons N. & B. 497. In Bank U. S. v. Lane, 3 Hawks, 453, the notice was sent to the shire town to the indorser, who was the high sheriff then in attendance at court; and it was held sufficient, although neither his residence or post-office was at that place.

[6] Morton v. Westcott, 8 Cush. 425; Cabot Bank v. Russell, 4 Gray, 167; Bank of Manchester v. Slason, 13 Vt. 334; Downer v. Remer, 21 Wend. 10. In Saco Nat. Bank v. Sanborn, 63 Me. 340 (1873), the indorser lived at the time he became indorser at the town of Baldwin. There was no post-office of that name, but there were three post-offices in the town named North, East and West Baldwin, respectively. Notice addressed to Baldwin was deemed sufficient,—the indorser having responded to a previous notice so sent without intimation that it was not properly directed.

[7] Hawkins v. Rutt, Peake's N. P. C. 186.

[8] In Skilbeck v. Carbett, 14 L. J. Q. B. 339; 7 Q. B. 846 (53 E. C. L. R.), Lord Denman says: "A bellman is an ambulatory post-office." See Byles on Bills [*270], 419.

[9] Montgomery Co. Bank v. Marsh, 3 Seld. 481; Reed v. Payne, 16 Johns. 218; Bank of Geneva v. Howlett, 4 Wend. 328; Van Vechten v. Pruyn, 3 Kern. 549.

know that he usually receives at the place where he is engaged in business, it will be sufficient to send it to the place where he lives.[1] But when a bill or note is protested at the place where the party entitled to notice has a place of residence, notice should not be sent away from there to another place where he transacts business.[2] In New York, the indorser of a note, who had a known residence in the village where the note was protested, and who was usually at home three days in the week, was held to be discharged, the notice having been sent by mail to another city, where his place of business was, where he spent four days of the week, and received his letters and papers, there being no evidence that the notice actually reached him in due time, so as to render it equivalent to personal service.[3]

When the party has his residence part of the year at one place and part at another, notice may be sent to either,[4] at least when the holder does not know, or is not to be charged with knowledge that he is accustomed to receive his letters at one of them.[5] But in the case of a temporary sojourn, as for the summer at a watering place, country place or village, the notice should be sent to the place of the party's permanent residence.[6]

§ 1026. When a party about to be absent directs notice to be sent to him at a place distant from his residence, so that its transmission thither and thence to the prior parties will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will not only be a good notice against him but as well against all prior parties.[7]

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[1] Seneca Co. Bank v. Neass, 3 Coms. 442; 5 Denio, 329.

[2] Story on Bills (Bennett's ed.), § 297.

[3] Van Vechten v. Pruyn, 3 Kern. 549, Comstock, J.

[4] Exchange, &c. v. Boyce, 3 Rob. (La.) 307.

[5] The notice should be sent where it is most likely to reach the party, as said in Chouteau v. Webster, 6 Metc. 1.

[6] Runyon v. Mountfort, Busbee, 371; Stewart v. Eden, 2 Caines, 121.

[7] Shelton v. Brathwaite, 8 M. & W. 252; Byles on Bills (Sharswood's ed.) [*272], 422.

But when the party goes to a place distant from his residence for the purpose of a business negotiation which will occupy a few weeks, it would be insufficient to send notice there without instructions to do so.[1]

§ 1027. *In the case of parties residing temporarily in a certain place*—members of Congress or of a State legislature residing at their respective capitals, while the bodies to which they belong are in session, for instance—it is sufficient and proper that notice should be sent to them at such place, or left there at their place of residence;[2] but after the adjournment of the session the rule would no longer apply, and notice should be sent to the party's permanent place of residence.[3] And while Congress is in session it will not be suf-

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[1] Walker v. Stetson, 14 Ohio St. 89.

[2] Chouteau v. Webster, 6 Metc. 1; Graham v. Sangston, 1 Md. 59; Marr v. Johnson, 9 Yerg. 1; *contra*, Walker v. Tunstall, 3 How. (Miss.) 259; 2 Sm. & M. 638.

[3] Bayley's Adm'r v. Chubb, 16 Grat. 284. In this case it was held that where notice was left at the dwelling-house of a member of Congress in Washington, after the adjournment of Congress, and after he had left the city, and it appeared that he kept up his domicile in the district he represented, and it was his habit to leave Washington directly after Congress adjourned, it was insufficient. Daniel, J., who delivered the opinion of the Court, distinguished this case from that of P. Chouteau v. Daniel Webster, 6 Metc. 1, in which a notice sent to Mr. Webster while he was a senator, and the Senate was in session, was held sufficient; so he said, "in the case of Graham v. Sangston, 1 Md. R. 59, the indorser at the time of the maturity of the bill was a member of the General Assembly of Maryland, then in session, and boarded at a hotel in Annapolis, and the notary gave notice by leaving the notice at the room of the indorser in the hotel; but whether the indorser was in Annapolis on the day that the notice was given did not appear; nor was there any proof in respect to the general domicile of the indorser. The notice was held sufficient."

The judge referred also to Walker v. Tunstall, reported in 3 How. (Miss.) 259, and in 2 Sm. & M. 638, as opposed to Chouteau v. Webster, and the result of which decision is, that "notice sent to a member of Congress who has no known place of residence, is good if directed to Washington, whilst Congress is in session, and he is there engaged in the discharge of his official duties; but that such notice is not sufficient if he has a known place of residence, except upon a failure of the notary to ascertain the residence after having used due diligence to ascertain it."

"And," he added, "it seems to me that the rule declared in Chouteau v. Webster is the more reasonable one; but I do not feel disposed to extend it still further than any case has gone yet, and make it embrace a notice sent to a mem-

ficient to deposit notice for the member in the post-office of the Senate or House of Representatives, as it should be served personally by a party in the same place at his residence, or where he might personally be.[1]

It has been held that even when the indorser who was a member of Congress was known to be in Washington, notice sent to his residence in his district was sufficient.[2]

§ 1028. Where there are two[3] or three[4] post-offices at which the indorser is in the habit of receiving his letters, notice may be sent to either; and where he lives at equidistance from two post-offices, notice addressed to one will suffice, although he was accustomed to receive his letters at the other.[5] Where the party lives in the United States, it is especially important in sending notices by mail to put the full address, town and State, as there are many cases in which the same name is applicable to towns and cities in different States. An omission to name the State, where there is more than one place bearing the name of the town, would be fatal if the notice were not duly received at the right place.[6]

§ 1029. It has been held in England not sufficient to address the notice to a person at a large town, as, for instance, to "W. Haynes, Bristol,"[7] without specifying in what part of it he resides, because there might be in so large a town many persons to whom so general an address might apply, the surname alone being given without any special designation that might identify him. But unless the name were very common—John Smith for instance—an address to a large city, giving the full Christian name as well as the sur-

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ber of Congress at Washington after the adjournment of Congress, and after the member had in fact left the city. The presumptions which upheld the notice during the session of Congress seem to me to have nothing to sustain or justify them after that body has adjourned. The presumption is then the other way."

[1] Hill v. Norvell, 3 McLean, 583. [2] Marr v. Johnston, 9 Yerg. 1.

[3] Shelburne Falls National Bank v. Townsley, 102 Mass. 177; Bank of Louisiana v. Tournillon, 9 La. Ann. 132.

[4] Bank U. S. v. Carneal, 2 Pet. 543.

[5] Rand v. Reynolds, 2 Grat. 171; Follain v. Dupre, 11 Rob. (La.) 454.

[6] Beckwith v. Smith, 22 Me. 125. [7] Walter v. Haynes, Ryan & M. 149.

name, would doubtless be regarded as sufficient. And in Massachusetts, where notice was addressed to "Mrs. Susan Collins, Boston," it was held sufficient to charge her as indorser, it not appearing that there was any other person of the same name. But Metcalf, J., said: "If notice in this case had been directed to 'Mrs. Collins, Boston,' without her first name, we should probably have held it to be insufficient, even without the authority of Walter v. Haynes. And we incline to the opinion that such a direction would be insufficient *prima facie*, though the town to which it should be sent was not a large one. For we know that there are in small towns in this State numerous persons of the same surname."[1] When, however, the address of the notice corresponds with the address which has been placed by the party upon the bill as an indication, as, for instance, "W. Moors, Manchester,"[2] or "T. M. Barron, London," it would be sufficient to follow it. At least a jury might infer due notice.[3]

If the party hold himself out as a resident in a certain place he is estopped from afterward denying it, and notice sent there is sufficient;[4] but if a party about to absent himself informs the holder where he is going, notice should be sent to the place mentioned.[5]

If no one be found at the party's place of residence, a notice put in the keyhole is sufficient.[6]

§ 1030. *The place of date of a bill* is not conclusive evidence that the drawer resides there, and is therefore an unsafe guide to the party sending notice; much less can it be relied upon as indicating the place of residence of an indorser. But it is *prima facie* evidence that the drawer resides there, and unless met with proof to the contrary, notice sent to the drawer at the place of date of the bill would be sufficient.

[1] True v. Collins, 3 Allen, 440.

[2] Mann v. Moors, Ryan & M. 249; see *ante*, § 1023.

[3] Burmester v. Barron, 17 Q. B. 878; see also Clarke v. Sharpe, 3 M. & W. 166.

[4] Lewiston Falls Bank v. Leonard, 43 Me. 144.

[5] Hodges v. Galt, 8 Pick. 251. [6] Stewart v. Eden, 2 Caines, 121.

In England it has been held that sending notice to the drawer addressed to London, where the bill was dated, sufficed, although the residence of the acceptor was stated in the acceptance, and by inquiry of him it would have been ascertained that the drawer resided in Chelsea, and he never got the letter.[1] But in the United States a stricter rule has been generally applied; and if it is shown that the drawer did not reside at the place of date, and did not duly receive the notice, it has been held that he will be discharged unless the holder proves that he had been unable to ascertain his place of residence after due diligence in inquiring had been used.[2] The same rule would, *a fortiori*, apply to the case of an indorser.

In Alabama, the Supreme Court has gone so far as to hold that the fact that the bill purports on its face to have been made at a certain place, is not alone sufficient evidence of the residence or post-office of the drawer.[3] Clearly, we should say, the date is *prima facie* evidence of the drawer's residence or post-office. And even when it is proved not to be so in fact, unless the holder could be shown to have had knowledge that it was not so in fact, the English rule, which allows him to follow the intimations of the instrument, seems to us the more just and reasonable.[4]

§ 1031. It has been said in some cases that the place of date is also *prima facie* evidence of the residence of the indorser of a bill or note; but this is straining the presumption too far.[5] It is but slight, at best, even in the case of the

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[1] Burmester v. Baron, 17 Q. B. 828; see also Clarke v. Sharpe, 3 M. & W. 166; Thomson on Bills (Wilson's ed.), 353.

[2] Lowery v. Scott, 24 Wend. 858; Barnwell v. Mitchell, 3 Conn. 101; Fisher v. Evans, 5 Binn. 541; Foard v. Johnson, 2 Ala. 565; Pierce v. Strathers, 27 Penn. St. 249; Hill v. Varrell, 3 Greenl. 233; Robinson v. Hamilton, 4 Stew. & P. 91. See Mason v. Pritchard, 9 Heiskell, 792.

[3] Sprague v. Tyson, 44 Ala. 340 (1870); Tyson v. Oliver, 43 Ala. 458 (1869); see cases cited in Chapter on Protest.

[4] See Chapter XX, on Presentment for Payment, Sec. V, § 639, Vol. 1.

[5] Sasseer v. Whitely, 10 Md. 98; Moodie v. Morrall, 3 Const. R. (S. C.) 367; Branch Bank v. Pierce, 3 Ala. 321.

drawer.[1] But coupled with other circumstances, the date of the bill might be evidence of the place of residence of the indorser. They should, however, be strong and persuasive.[2] for there is no *prima facie* presumption that an indorser resides at the place of date,[3] or at the place of payment.[4]

§ 1032. *Removal of party entitled to notice.*—If at the time the bill or note is drawn or indorsed the party resides at a certain place, the holder may, as a general rule, presume that he resides there at its maturity, and send notice accordingly,[5] and the presumption of continued residence is all the stronger when the paper was discounted there at the time it was executed.[6] Where the removal was under circumstances of peculiar notoriety, it was held, in a Tennessee case, insufficient to send notice to the prior place of residence;[7] and in Virginia it has been recently said by the Supreme Court of Appeals, through Staples, J.: "Where the holder and indorser reside near to each other in a small city like Alexan-

[1] Lowery v. Scott, 24 Wend. 358. In this case the bill was dated Michigan City, Indiana, but the drawer resided at Waterford, New York. Notice was sent to Michigan City, Indiana, and it not appearing that inquiry had been made to ascertain the drawer's residence it was held insufficient. Bronson, J., said: "In the case of an indorser it clearly would not be sufficient to send notice to the place where the bill is dated, without showing something more. But it is said that will do in the case of a drawer. Although there may be a slight presumption that the drawer resides at the place where the bill purports to have been made, it cannot be very strong, for it is matter of common experience that men draw bills when absent from home, on business or for pleasure, and date them at the place where they are drawn. As the plaintiffs are indorsees, and not original parties to the bill, it is not to be presumed that they knew where the drawer resided. But I think they were bound to make some inquiry on the subject at the place where the payment was demanded."

[2] In Wood v. Corl, 4 Metc. 203, the note was dated at Buffalo, and the notary testified that it was reported that the indorser lived there. Notice to indorser sent to Buffalo was held sufficient. In Page v. Prentice, 5 B. Monr. 7, the bill was dated at Louisville, and notice sent so directed to the indorser was held sufficient, it appearing that process had been served on him in the county in which Louisville is located.

[3] Lowery v. Scott, *supra*.

[4] Gilchrist v. Donnell, 53 Mo. 591.

[5] Knott v. Venable, 42 Ala. 186; Harris v. Memphis Bank, 4 Humph. 519; Farmers' Bank v. Harris, 2 Humph. 311; Dunlap v. Thompson, 5 Yerg. 67; Bank of Utica v. Phillips, 3 Wend. 408; Saco Nat. Bank v. Sanborn, 63 Me. 340.

[6] Ward v. Perrin, 54 Barb. 89.

[7] Planters' Bank v. Bradford, 4 Humph. 39.

dria, the jury may presume from the proximity of the parties, and the frequency of their communication, and the circumstances of notoriety attending the removal, that the holder was apprised of the change of domicile"[1]—which ruling vitiated notice left at the prior residence of the indorser.

In a New York case, where the indorser of a note payable one year after date resided at Rochester at the time of, and for ten years prior to the indorsement, and continued to reside there until six months before it fell due, and the plaintiff was informed by the indorser's relatives that she continued to reside there, notice addressed to Rochester was held sufficient. And Earl, Commissioner, said: "I think it would not be unreasonable to hold that in all cases, no matter how long the paper has to run, a notice of protest addressed to the indorser at the place where he resided when he made the indorsement should be sufficient to charge him, although he may have changed his residence. The holder should be permitted to act in good faith upon the presumption of his continued residence unless he has received information of his change of residence."[2] This rule is wise and just, and is

[1] McVeigh v. Allen, 29 Grat. 596 (1877), citing Harris v. Memphis Bank, 4 Humph. 519; Farmers' M. Bank v. Harris, 2 Humph. 311; Bank of Utica v. Phillips, 3 Wend. 408.

[2] Requa v. Collins, 51 N. Y. 148 (1872), Earl, C., continued: "In Bank of Utica v. Davidson, 5 Wend. 588, a note was presented for discount by the agent of the maker, who informed the clerk of the bank that the indorsers resided in Bainbridge, and the clerk made a memorandum of this fact. When the note became due it was protested, and a notice of protest was directed to the defendant, one of the indorsers, at Bainbridge, no further inquiries as to his residence having been made. It turned out that the defendant had, a short time before he indorsed the note, removed from Bainbridge, a distance of twelve or fourteen miles, to Masonville, in another county. The notice was held sufficient to charge the defendant, upon the ground that due diligence had been used. In Bank of Utica v. Bender, 21 Wend. 643, the drawer took to the bank a bill of exchange, indorsed by the defendant, which was dated at Chittenango, and there wrote under the name of the defendant 'Chittenango,' to indicate his place of residence. This memorandum by the drawer, of course, had no greater effect than if he had at the time given the parol information that the indorser resided at Chittenango. He in fact resided at Manlius, and had resided there for twenty years. The bill was protested for non-payment, and notice of protest mailed to Chittenango, without any further inquiry as to the indorser's residence. It was held that the

fairly deducible from the authorities, though it would seem to have been limited in a previous New York case to paper having the usual time of bankable paper to run.[1]

§ 1033. *In the second place, when special messenger may be employed.*—The holder is not bound to send notice by mail; and he may, if he pleases, in all cases send it by a special messenger.[2] In such cases it will be sufficient if the notice reaches the party entitled thereto on the same day that it would have reached him in due course of mail, although later, if within business hours;[3] but if it arrives the day after, and the delay is not explained and excused, it will be fatal.[4] And the holder is responsible if his messenger do not deliver the notice within the necessary time, and the party is discharged,[5] unless there were no public means of communication, and the holder exercised reasonable care in selecting his messenger.[6]

"It is difficult to lay down a precise rule as to the extent of delay in the arrival of a private conveyance which will nullify the notice, although such delay as prevents the person getting notice, even for one post, from sending advice to his correspondent, will probably be fatal. It would likewise

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notice was sufficient, and that the defendant was charged. In Ward v. Perrin, 54 Barb. 89, the action was against the indorser of a note payable four months from date. At the time when the indorsement was made, and for about two months thereafter, the indorser resided in Rochester. About two months before the note fell due he removed from Rochester to Bergen. The note was protested, and notice of protest was mailed to the defendant at Rochester. The Court held, that the holders of the note were not bound to make any further inquiries, and that they could act upon the information as to the indorser's residence which they received when they discounted the note; that they had the right, when the note matured, to assume that the indorser continued to reside in Rochester, and to act accordingly in taking the requisite steps to charge him, unless they knew that in the meantime he had changed his residence."

[1] Bank of Utica v. Phillips, 3 Wend. 408.

[2] Bank of Columbia v. Lawrence, 1 Pet. 578; Parsons v. Crallan, 2 J. P. Smith, 404; Doobree v. Eastwood, 3 C. & P. 250 (14 E. C. L. R.); Jarvis v. St. Croix Manuf. Co. 23 Me. 287; Story on Bills, § 295.

[3] Bancroft v. Hall, Holt, 476; Story on Bills, § 295.

[4] Jarvis v. St. Croix Manuf. Co. 23 Me. 287; Darbishire v. Parker, 6 East, 6; Byles on Bills (Sharswood's ed.) [*271, 272], 421.

[5] Van Vechten v. Pruyn, 3 Kern. 549. [6] 1 Parsons N. & B. 479.

appear that in such a case the holder must prove the safe arrival of the letter. But when a person, instead of sending notice directly by post, writes to a correspondent on the spot to give notice, and that correspondent goes to the defendant's warehouse for this purpose, sooner than a letter could have reached him by post, but is prevented by finding the warehouse shut during business hours, the defendant cannot plead the lateness of the notice."[1]

§ 1034. It has been held in some cases that where the party entitled to notice resides at a point remote from any post-office, the holder must send notice by a special messenger.[2] But it seems to us that it could not be reasonably expected of the holder to send notice to a party exiled from communication with the world; or reasonable to presume that the party did not at convenient periods inquire at the nearest post-office—and that sending the notice to such post-office is all that should be required.[3]

"One who becomes a party to a commercial instrument should be considered as rendering himself subject to commercial law and usage," is the very just observation of the annotators of the American Leading Cases on this question.[4] And the language of the court in a case just quoted, if a little stilted, embodies the true wisdom of the subject, as it seems to us. Ford, J., said:[5] "If persons residing far from a post-town, aside from the common walks of gregarious commerce, will give their names in guaranty of commercial paper, it is better that they should be held to inquire for letters at the nearest post-office about the time such paper comes to maturity, than that the holder should be compelled to send a special messenger one hundred and fifty miles to serve personal notice, or that an established system of notice, sufficiently complex already, should be forced to give way to the

[1] Thomson on Bills, 340; Bancroft v. Hall, Holt, 476.

[2] Fish v. Jackman (1 Appleton), 19 Me. 467; Farmers' Bank v. Butler, 3 Lit. 498; Bedford v. Hickman, 1 Yerg. 166.

[3] State Bank v. Ayres, 2 Halst. 130; Story on Bills, § 297.

[4] 1 American Leading Cases, 403.

[5] State Bank v. Ayres, 2 Halst. 130.

introduction of novel exceptions, imposing burdensome, expensive and hazardous duties on all men of business merely out of favor to eccentric residences." When the messenger was necessary, or most convenient, his reasonable expenses are chargeable to the party receiving notice.[1]

SECTION VII.

TIME WITHIN WHICH NOTICE MAY AND MUST BE GIVEN.

§ 1035. *In the first place, as to the time within which notice may be given.*—It is quite clear that notice of dishonor implies the dishonor as taking place before the notice. Knowledge by anticipation that the instrument will be dishonored does not affect the rule, and if notice be given beforehand it is premature and ineffectual.[2]

The language of the earlier authorities was, that notice of dishonor should be given "within a reasonable time" after the dishonor had occurred, and the like expression is still sometimes met with;[3] but the period allowed the holder is now so definitely limited and fixed that this phrase is entirely too loose and general to convey a correct idea of the requirements of the law.[4]

§ 1036. *As to the time of the day of dishonor* at which the holder may give notice, it is well settled that as soon as

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[1] Pearson v. Crallan, 2 J. P. Smith, 404 (King's Bench).

[2] Jackson v. Richards, 2 Caines, 343; Chitty on Bills [*482], 544.

[3] Story on Bills, § 285; 1 Parsons N. & B. 507; Chitty on Bills, ch. 8, p. 366. There was formerly a statute in Virginia which allowed eighteen months as a reasonable time within which to give notice of protest of a bill of exchange. It was considered in Stott v. Alexander, 1 Wash. 335 (1794), in which case the bill was protested in September, 1787, and notice given in June, 1788, and the Court, by its president, Edmond Pendleton, said: "No facts being stated to take this case out of the general rule before mentioned, and established by the act of Assembly, we are of opinion that the notice is reasonable."

This statute was repealed in 1792, and is quoted as a curious relic. Both in England and Scotland formerly there was no fixed time within which it was necessary to give notice; the new rule is as certain as a statute. See Thomson on Bills, 346.

[4] 1 Parsons N. & B. 507.

the demand is made, and the dishonor has occurred, the holder need not wait until the close of business hours to send notice.[1] Mr. Chitty has well expressed the law on this subject: "It has been doubted whether, in the case of an inland bill or promissory note payable after date or sight, or on a particular event, the holder can legally give notice of the non-payment on the day when it falls due, or whether the drawee or maker is not entitled to the whole of that day to pay it in, without any reference to banking hours, and whether it can be considered as dishonored until the whole of that day has elapsed.[2] But though in general, when a payment is to be made on a day certain, the party is not in default until the expiration of it, the law merchant considers the contract of an acceptor of a bill, or maker of a note, to have been to pay on demand at any part of that day, and therefore it seems clear that notice of non-payment may be given on the last day of grace, whenever, after due presentment and demand, the drawee makes an unqualified refusal to pay at all.[3] And in a more recent case it was held that notice of dishonor may be given on the same day that the bill falls due, although there may not have been an absolute refusal, but a mere neglect to pay on presentment.[4] If the house at which the bill is payable be shut up, and no one there, it is the same as a refusal.[5] It should seem, that in these cases of

[1] Bank of Alexandria v. Swan, 9 Pet. 33; Lenox v. Roberts, 2 Wheat, 373; Coleman v. Carpenter, 9 Barr, 178; Price v. Young, 1 McCord, 339. In *ex parte* Moline, 19 Ves. 216, a demand on the acceptor at 11 A. M., and notice sent immediately, warranted proof of debt against the drawer who had become bankrupt. Lord Eldon said: "I do not recollect any decision, that if an acceptor declares at 11 o'clock in the morning that he will not pay, notice of that to the drawer is not good. If the law does not impose on the holder the duty of inquiring again before 5 o'clock, it would be extraordinary that this information to the drawer of an answer precluding any hope of obtaining anything by calling again, should not have effect." Story on Bills, § 290; Byles (Sharswood's ed.) [*276], 428; Thomson on Bills, 348; Edwards on Bills, 615, 622.

[2] Leftly v. Mills, 4 T. R. 170; Haynes v. Birks, 3 Bos. & P. 602; Colkett v. Freeman, 2 T. R. 59; Hartley v. Case, 1 Carr. & P. 555; 4 B. & C. 339.

[3] Burbridge v. Manners, 2 Camp. 195; Hartley v. Case, 1 Carr. & P. 556; *Ex parte* Moline, 19 Ves. 216; King v. Crowell, 61 Me. 244.

[4] Clowes v. Chaldecott, 7 L. J. K. B. 147.

[5] Hine v. Allely, 4 Barn. & Ad. 624; 1 Nev. & M. 433.

notice of dishonor, given on the day on which the bill is payable, the notice will be good or bad, as the acceptor may or may not afterward pay the bill; if he does not afterward pay it [on that day], the notice is good; and if he does, it of course comes to nothing."[1]

§ 1037. It is also certain that the holder is not obliged to give notice immediately on the very day of the dishonor,[2] although he has the option to do so if he pleases; and in point of fact it is usual for the holder or notary to prepare and send notice forthwith after dishonor. It is difficult to express a precise rule which will apply to all cases, and to fix definitely within what time after the day of dishonor the notice must be sent; and it is to be determined by reference to the residence of the parties, the means and frequency of communication, and the time of departure of the mails or other conveyance by which notice may be transmitted.

§ 1038. *In the second place, as to the time within which notice may be given.*—When the holder and the party entitled to notice reside in the same place, the settled rule is that the holder has until the expiration of the following day to give notice; and he is not confined within the business hours of the day to give the notice at the party's dwelling.[3] He may give it there at any time before the hours of rest; but if he gives it at the place of business, it must be done during the hours of business.[4]

§ 1039. *In the third place, as to the time within which notice must be given when the parties reside in different places*, and there is mail communication between them, the rule laid

[1] Chitty on Bills (13th Am. ed.) [*482], 544; Hartley v. Case, 1 Car. & P. 556; Abbott, C. J.

[2] Darbishire v. Parker, 6 East, 8; 2 Smith, 195; Tindall v. Brown, 1 T. R. 168; Burbridge v. Manners, 3 Camp. 193; Russell v. Langstaffe, Doug. 515; Muilman v. D'Eguino, 2 H. Black. 565; Chitty on Bills [*482], 544.

[3] Jameson v. Swinton, 2 Taunt. 224; Bayley on Bills, 176.

[4] Adams v. Wright, 14 Wis. 408; Cayuga Co. Bank v. Hunt, 2 Hill (N. Y.), 635; Crosse v. Smith, 1 Maule & S. 545; Garnett v. Woodcock, 6 Maule & S. 44; Parker v. Gordon, 7 East, 385; Allen v. Edmundson, 2 Carr. & K. 547; Story on Bills, § 290.

down by the United States Supreme Court is, that the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided such mail is not closed before early and convenient business hours of that day; in which case it must be sent by the next mail thereafter.[1]

In other words, the notice must be sent by the first mail which leaves after the day of dishonor is past, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor.

This rule is sanctioned by numerous and eminent authorities, either expressly or by implication, and, it seems to us, adopts the only principle which may be safely followed in all cases.[2]

§ 1040. Chancellor Kent has expressed the opinion that it would be sufficient to mail the notice at any time on the day after dishonor,[3] but this is a greater relaxation than the leading cases recognize, and is going further than necessary to extend a liberal time to the holder.[4] In many cases it is said that notice must be sent by the mail of the next day after dishonor: but most of these cases, as observed by Professor Parsons, were cases which held that notice so sent is

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[1] Fullerton v. Bank U. S. 1 Pet. 605; Bank of Alexandria v. Swann, 9 Pet. 33; Lenox v. Roberts, 2 Wheat. 373; U. S. v. Barker, 12 Wheat. 559; 4 Wash. 465. These cases do not state the rule as broadly as laid down in the text, but they are not inconsistent with it, as explained in the case of Lawson v. Farmers' Bank, 1 Ohio St. 206—a most learned and instructive case on the subject of notice.

[2] Farmers' Bank v. Duvall, 7 Gill & J. 78; Lawson v. Farmers' Bank, 1 Ohio St. 206; Carter v. Burley, 9 N. H. 558; Sussex Bank v. Baldwin, 2 Har. 487; Wemple v. Dangerfield, 2 Sm. & M. 445; Downs v. Planters' Bank, 1 Sm. & M. 261; Mitchell v. Cross, 2 R. I. 437; Burgess v. Vreeland, 4 N. J. 71; Howard v. Ives, 1 Hill (N. Y.) 263; Hartford Bank v. Stedman, 3 Conn. 489; Chick v. Pillsbury, 24 Me. 458; Eagle Bank v. Chapin, 3 Pick. 180; Manchester Bank v. Fellows, 8 Fost. 302; 1 Parsons N. & B. 511; Redfield & Bigelow Lead. Cases, 393; 1 American Lead. Cases, 390; Story on Bills, § 288; Darbishire v. Parker, 6 East, 3; Haynes v. Birks, 3 Bos. & Pull. 599.

[3] 3 Kent Com. 106, note c.

[4] 1 Parsons N. & B. 508, 509.

sufficient, which is undoubtedly true.[1] "By the next practicable mail," after the day of dishonor, is the language adopted by a number of authorities;[2] but they are not altogether concurrent in the definition of the phrase, and the rule of the text seems less susceptible than any other of misinterpretation, or of working injustice to any of the parties.

Chitty considers that "when the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place where he is early or late."[3] Story regards the rule as "not so strict as it is laid down by Mr. Chitty," and adds: "It would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that, therefore, it will be sufficient if he sends it by the next post that goes after twenty-four hours from the time of the dishonor. Thus, suppose the dishonor is at four o'clock P. M. on Monday, and the post leaves on Tuesday at nine or ten o'clock, it seems to me that the holder need not send by that post, but may safely wait and put the notice into the post-office early enough to go by the post on Wednesday morning at the same hour. I have seen no late case which imports a different doctrine; on the contrary, they appear to me to sustain it. But as I do not know of any direct authority which positively so decides; this remark is merely propounded for the consideration of the learned reader."[4] The rule stated by the text seems to us the best. It is as liberal as is necessary for the holder. It prevents undue delay as to the party to be notified, and it is sustained by direct and high authority.

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[1] 1 Parsons N. & B. 510, 511.

[2] Kaskell v. Boardman, 8 Allen, 40 in which case Bigelow, C. J., said: "The rule is that notice should go by the next practicable post after the holder received notice of dishonor of the note." Story on Bills, § 382.

[3] Chitty on Bills [*486], 548.

[4] Story on Bills (Bennett's ed.) p. 326, § 290, note 1.

§ 1041. What hour of the next day after dishonor may be considered as reasonably early and convenient within the meaning of this rule must depend upon the habits of the business community in each place, and no precise hour can be arbitrarily named. If the mail closes before early business hours of the day after dishonor, whether it be during the night before,[1] or at three,[2] four,[3] five,[4] or six[5] o'clock A. M. thereof, the notice need not, under the rule, be sent thereby. Seven o'clock seems debatable,[6] at least the hour is not clearly within early business hours, unless at some particular localities, and sunrise is certainly too soon.[7]

Of course, three P. M. would be too late;[8] and it has been held that where the mail closes at half-past ten A. M. notice should have been sent by it;[9] so where it closed at ten A. M.,[10] and likewise where it closed at ten minutes past nine A. M.[11] But in another locality half-past nine A. M. was thought unreasonably early;[12] while in another still, it has been held that proof that the notice was deposited in the post at nine A. M. was insufficient.[13]

So that the notice goes by some mail of the day after dishonor, it is not material by which mail of that day, and that a mail left earlier than that by which notice was conveyed makes no difference,[14] the law taking no notice of frac-

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[1] See *ante*, § 1039; Geill v. Jeremy, 1 Moo. & M. 61.

[2] Mitchell v. Cross, 2 R. I. 437.

[3] Wemple v. Dangerfield, 2 Smedes & M. 445.

[4] West v. Brown, 6 Ohio St. 542.

[5] Chick v. Pillsbury, 24 Me. 458; Davis v. Hanly, 7 Eng. (Ark.) 645.

[6] In Stephenson v. Dickson, 24 Penn. St. 148, 7 o'clock was held not an unreasonably early hour; but in Commercial Bank v. King, 3 Rob. (La.) 243, it was held certainly sufficient to show that notice was deposited in the post at seven o'clock.

[7] Deminds v. Kirkman, 1 Smedes & M. 644.

[8] Seventh Ward Bank v. Hanrick, 2 Story, 416.

[9] U. S. v. Barker, 4 Wash. C. C. 464; 12 Wheat. 559.

[10] Haskell v. Boardman, 8 Allen, 38.

[11] Lawson v. Farmers' Bank, 1 Ohio St. 206.

[12] Burgess v. Vreeland, 4 N. J. 71. So in England half-past nine was held too early. Hawkes v. Salter, 4 Bing. 715 (13 E. C. L. R.); Byles on Bills [*274], 426.

[13] Downs v. Planters' Bank, 1 Smedes & M. 261.

[14] Lindo v. Unsworth, 2 Camp. 602; Martin v. Ingersoll, 8 Pick. 1.

tions of a day. Certainly, it must go by the mail of the next day (if it leave not too early as we have said); or if there be no mail next day, it must go by the next mail thereafter.[1]

§ 1042. If the party to whom notice is to be given have himself, by his mode of drawing or indorsing, thrown difficulty in the way of the holder, the time allowed the latter will be extended, as, for instance, where the drawer wrote his name so badly that the holder mistook the spelling of it, and the letter containing the notice consequently miscarried.[2]

§ 1043. Christmas day, Sunday,[3] the Fourth of July,[4] or any day of public thanksgiving,[5] or of religious festival,[6] (upon which a man is forbidden by his religion to transact secular affairs), is counted out of the computation of time within which notice must be given. But notice is not invalid because given on the Fourth of July or other holiday;[7] and although notice need not be forwarded until the day after dishonor or of its reception, still it is not irregular or improper to do so if the party chooses, the time being allowed for his convenience.[8] If notice is received on Sunday, it need not be forwarded until the Tuesday following, as he is not bound to open the letter containing it or to recognize it until

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[1] Deblieux v. Bullard, 1 Rob. (La.) 66. In this case it was said it might be given on Sunday.

[2] Hewitt v. Thompson, 1 M. & Rob. 543.

[3] Byles on Bills (Sharswood's ed.) [*277], 429; Chitty on Bills, (13th Am. ed.) [*488], 551, 552; 1 Pars. N. & B. 515. See Chapter XX, Sec. IV, §§ 627, 628, vol. 1.

[4] Cuyler v. Stevens, 4 Wend. 566.

[5] Byles on Bills (Sharswood's ed.) [*277], 429.

[6] Lindo v. Unsworth, 2 Camp. 602; Martin v. Ingersoll, 8 Pick. 1.

[7] Deblieux v. Bullard, 1 Rob. (La.) 66. In this case it was said it might be given on Sunday.

[8] Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beall, 6 Wheat. 104; Curry v. Bank of Mobile, 8 Port. (Ala.) 360; McClane v. Fitch, 4 B. Mon. 599; Coleman v. Carpenter, 9 Penn. St. 178; Haslett v. Ehrick, 1 Nott & McC. 116; Corp v. McComb, 1 Johns. Cas. 328; Smith v. Little, 10 N. H. 526; Lawson v. Farmers' Bank, 1 Ohio St. 206.

Monday;[1] and if received on Saturday it need not be forwarded until Monday.[2]

§ 1044. *Each holder has a day to give notice to his predecessor on the paper.*—The party receiving the notice may desire to communicate it to parties antecedent to him, and others before him likewise to transmit it to those antecedent to them. In such cases the general rule also is, that each successive party who receives notice of dishonor is entitled to a full day to transmit it to any antecedent party who is chargeable over to him upon payment of the bill or note.[3] So that, if a party receives notice on one day, he is not bound to forward it to a prior indorser until the next day, and not then if the mail leaves before early business hours. Thus, an indorser who received notice at eight or half-past eight in the morning, has been held not bound to send it to a prior party by a mail leaving at twelve o'clock the same day, Lord Ellenborough saying: "It has been laid down, I believe, since the case of Darbishire v. Parker, as a rule of practice, that each party, into whose hands a dishonored bill may pass, should be allowed one entire day for the purpose of giving notice; a different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it.[4]

Upon receiving notice of dishonor, the indorser should—if there be prior parties whom he wishes to hold liable—immediately notify not only the one immediately antecedent

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[1] Bayley on Bills, 172; Bray v. Hadwen, 5 Maule, 68; 1 Parsons N. & B. 515; Wright v. Shawcross, 2 Barn. & Ald. 501, note; Haynes v. Birks, 3 B. & P. 599; Chitty on Bills (13th Am. ed.), [*488], 551.

[2] Howard v. Ives, 1 Hill, 263; Friend v. Wilkinson, 9 Grat. 31.

[3] Jameson v. Swinton, 2 Taunt. 224; Geill v. Jeremy, 1 Mood. & Malk. 61; Rowe v. Tipper, 13 C. B. 249; Lawson v. Farmers' Bank, 1 Ohio St. 206. See 1 Pars. N. B. 513, and cases cited; Story on Bills, § 291; Byles on Bills (Sharswood's ed.) [*277], 430; Thomson on Bills, 348; Smith on Mercantile Law, 149; Simpson v. Turney, 5 Humph. 419; Shelburne Falls N. Bank v. Townsley, 102 Mass. 177; 107 Mass. 444; Seaton v. Scovill, 18 Kans. 435.

[4] Bray v. Hadwen, 5 Maule & Sel. 68.

to him, but all of them; for otherwise, by the negligence of his previous indorser, or of some one of the successive indorsers, he may lose recourse against some or all of them but the one notified by him.

§ 1045. The overdiligence of one party to a bill or note in giving notice cannot supply the lack of diligence in another; and though the drawer or indorser sought to be charged received the notice as early as he would have been entitled to it had it passed in due course through the intermediate parties, yet the holder, in order to bind him, must show due diligence in each and every one of such intermediate parties.[1] "If," said Tucker, P., in Brown v. Fergusons, 4 Leigh, 37, "there be a defect in any link of the chain of notices, it is fatal to the holder's demand. We cannot eke out the underdiligence of one party by the overdiligence of another; * * for as the recourse of any immediate indorser against those who lie behind him arises from his own liability to pay the bill to him to whom he passed it, the laches which takes away his liability takes away theirs also." Nor can any party by waiving his own discharge and paying the bill or note, waive the discharge of antecedent parties.[2] Moveover, the holder giving notice to the first, or any prior party, must give it to him in a day, as well as to the last indorser.[3]

But if the holder of a dishonored promissory note, under cover to whom a notice to an indorser of its protest is seasonably sent by mail by the notary, from another post-town

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[1] Brown v. Ferguson, 4 Leigh, 37; Simpson v. Turney, 5 Humph. 419; Smith v. Roach, 7 B. Mon. 17; Whitman v. Farmers' Bank, 8 Port. (Ala.) 257; Stix v. Mathews, 63 Mo. 371; Etting v. Schuylkill Bank, 2 Barr. 355; Fitchburg Bank v. Perley, 2 Allen, 433; American Life Ins. Co. v. Emerson, 4 Smed. & M. 177; Carter v. Burley, 9 N. H. 558; Mitchell v. Cross, 2 R. I. 439; Manchester Bank v. Fellows, 8 Fost. 302; Kennedy v. Geddes, 8 Port. (Ala.) 263; Rowe v. Tipper, 13 C. B. 249 (76 E. C. L. R.); 1 Pars. N. & B. 514; Story on Bills, § 294; Thomson on Bills, 348, 349; Turner v. Leach, 4 B. & Ald. 451.

[2] Turner v. Leach, 4 B. & Ald. 451 (6 E. C. L. R.)

[3] Dobree v. Eastwood, 3 Car. & P. 250; Rowe v. Tipper, 18 C. B. 249 (76 E. C. L. R.); see Thomson on Bills, 349; Huntley v. Sanderson 1 Cr. & M. 466.

where the note was payable, replaces it in the post-office without unreasonable delay, properly addressed to the indorser, it is immaterial to the sufficiency of the notice to bind the indorser, that in the ordinary course of the mails he might have received it sooner if it had been mailed to him directly by the notary.[1]

§ 1046. In the case of a foreign bill protested in one of the United States, and the party entitled to notice resides in some other nationality beyond seas, it is sufficient to send notice by the first regular ship; and it is no objection that if sent by a chance ship it would reach him sooner.[2] It should be sent by the ship going to the port at which the party resides, or to some neighboring or convenient port according to the usual course of transportation of letters of business, if a reasonable time before its departure is left for writing and forwarding the notice.[3]

"If, with the ports of the country where the bills are protested, the communication is irregular, or at different seasons by different routes or ways of conveyance, that should be adopted to send the notice, which may reasonably be presumed to be the most certain and expeditious, under all the circumstances."[4]

If the party delay sending notice until after a regular

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[1] Shelburne Falls Nat. Bank v. Townsley, 101 Mass. 444.

[2] Muilman v. D'Eguino, 2 H. Black. 565; Darbishire v. Parker, 6 East, 3. In Stainback v. Bank of Virginia, 11 Grat. 260, a bill drawn by a house in Petersburg, Va., on a house in London, was protested for non-acceptance on April 5th, 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th, and notice of dishonor was sent by it. At that time the Cunard line carried the mail between the two countries under a contract with the British Government, and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London post-office, and such packets sailed from London, or Liverpool, on the 7th, 10th, and 17th of April, 1843. But it was probable that the steamer of the 19th would arrive before any of them. The notice was held duly transmitted, Samuels, J., saying that any other course would have sacrificed the object of the law. Byles on Bills (Sharswood's ed.) [*272], 421; Bayley on Bills, 179.

[3] Story on Bills, § 286; 1 Pars. N. & B. 485, note.

[4] Story on Bills, § 286.

ship to the place where notice is addressed has departed, sending it by the next ship will be too late, unless the delay be excused by circumstances.[1]

SECTION VIII.

THE ALLEGATION AND PROOF OF NOTICE.

§ 1047. *First, as to the allegation of notice.*—Byles states that "it was formerly considered doubtful[2] whether such facts as dispense with presentment, protest or notice of dishonor could or could not be given in evidence, in support of the common allegations of presentment, protest or notice in the declaration." But that "it is now, however, clear that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration, and that proof of those facts is inadequate to the support of a positive averment of presentment, protest or notice."[3] He adds: "But if it should distinctly appear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterward promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, when there has been a neglect to give notice of dishonor, and a promise to pay, with notice of the omission, has been afterward made before action brought, for then the defendant has, in the words of the declaration, had notice of the dishonor, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject does not appear to be very clearly settled.[4] It seems, however, that notice too late in the usual

[1] Lenox v. Leverett, 10 Mass. 1.

[2] Citing Cory v. Scott, 3 B. & Ald. 619; Bayley on Bills (5th ed.) 406.

[3] Byles on Bills [*409], 595, 596, and [*293], 453; citing Bourgh v. Legge, 5 M. & W. 418; see Terry v. Parker, 6 Ad. & E. 502; s. c. N. & P. 752; Carter v. Flower, 16 M. & W. 749.

[4] Citing, see Brownell v. Bonney, 1 Q. B. 39; 3 M. & Ry. 359; s. c. Dans. & L. 151; Firth v. Thrush, 8 B. & C. 387; Baldwin v. Richardson, 1 B. & C. 245; s. c. 2 D. & Ry. 285.

course, but reasonable and sufficient under the special circumstances, may be proved under the ordinary allegation."[1]

§ 1048. In the United States the authorities on this subject are not entirely harmonious; but the views of Mr. Greenleaf is that circumstances of excuse or dispensation with presentment, protest and notice may be shown under an averment of due presentment, protest and notice, "the evidence being regarded not strictly as matter in excuse, but as proof of a qualified presentment and demand, or of acts which, in their legal effect and by the custom of merchants, are equivalent thereto."[2] This we think is the better view, and it is sustained by decisions of the highest respectability. In Massachusetts it is settled by a series of decisions that in an action by the indorsee against the indorser of a note, evidence of a waiver of demand, protest and notice is sufficient in support of an averment of demand, protest and notice,[3] and in other States the same view has been adopted.[4] Edwards states on English authority that a waiver of notice before dishonor cannot be proved under an allegation of due notice;[5] but this is not the prevailing rule in the United States.[6]

§ 1049. So it may be regarded as established in the United States, that evidence of due diligence in the holder to obtain payment, and to make protest and give notice is

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[1] Citing Carter v. Flower, 16 M. & W. 749.

[2] 2 Greenleaf on Evidence, § 197.

[3] Harrison v. Bailey, 99 Mass. 620; Taunton Bank v. Richardson, 5 Pick. 436, 444; Jones v. Fales, 4 Mass. 245; City Bank v. Cutter, 3 Pick. 414; North Bank v. Abbot, 13 Pick. 465; Kent v. Warner, 12 Allen, 561. This, however, has been there regarded as an exception "to an established and most salutary rule of evidence," and held not applicable to other executory agreements, in Colt v. Miller, 10 Cush. 51.

[4] Tobey v. Berly, 26 Ill. 426; Norton v. Lewis, 2 Conn. 478 (waiver before maturity); Camp v. Bates, 11 Conn. 488, 493 (waiver after maturity); Windham Bank v. Norton, 22 Conn. 214, 219; Kennen v. McRea, 7 Port. (Ala.) 176, 186. See also Spann v. Balzell, 1 Florida, 302; Shirley v. Fellows, 9 Porter, 300; McVeigh v. Bank of Old Dominion, 26 Gratt. 799, Moncure, P.; Redfield & Bigelow's Lead. Cases 417; 2 Smith's Lead. Cases 74.

[5] Edwards on Bills, 636.

[6] Norton v. Lewis, *supra*.

admissible under the general averment of due demand, protest and notice.[1] Thus, where the maker of a note could not be found at his store, and a demand was made on his clerk, it was not thought necessary to aver this fact specifically, but that it might be shown under an allegation of due demand upon the maker. So where the drawer of a check stopped payment, and due notice was averred, it was held that the averment might be disregarded as surplusage, and the defendant was held bound.[2]

§ 1050. *Second, as to proof of notice.*—The burden of proving that notice was duly given so as to charge the drawer of a bill, or the indorser of a bill or note, rests upon the plaintiff. And this burden he may bear in two ways: First, by proving due and legal diligence used in giving notice to the party entitled thereto, in which case the legal presumption of its due receipt will attach and obviate the necessity of further evidence.[3] Or second, by proving that notice was actually received in due time, in which case it matters not what means of communication was employed.[4] Presumptions of due notice may also be created by proof of promise to pay, or part payment, in the manner elsewhere considered.[5] An admission or acknowledgment of notice is presumptive evidence of notice.[6]

§ 1051. The plaintiff must distinctly show that notice

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[1] Stewart v. Eden, 2 Caines, 127; Williams v. Matthews, 3 Cow. 262; Ogden v. Conley, 2 Johns. 274; see also Saunderson v. Judge, 2 H. Bl. 510; *contra*, Curtis v. State Bank, 6 Blackf. 314. In England the rule is different. Allen v. Edmundson, 17 L. J. N. S.; Common Law, 291 (1848); 2 Exch. 719.

[2] Purchase v. Mattison, 6 Duer, 592; see also Jacks v. Darrin, 3 E. D. Smith, 558 (Professor Parsons in 2d vol. N. & B. p. 72, quotes these cases by mistake for the opposite doctrine).

[3] Lambert v. Ghiselin, 9 How. 552; Saco National Bank v. Sanborn, 63 Maine, 340; Shed v. Brett, 1 Peck, 401, the Court saying: "An averment of notice will be sufficiently proved by showing that the steps necessary to give the notice have been taken, if subsequently received, it will relate to the time when it was sent; if never received, the fact of having put it in the proper train is enough."

[4] Dickens v. Beal, 10 Pet. 572.

[5] See Chapter XXXV.

[6] Todd v. Neal's Adm'r, 49 Ala. 266; Donegan v. Wood, 49 Ala. 242.

was given on the proper day; it will not suffice to show that it was given on one of two days, because the latter would be too late.[1] But when it is shown that the notice was on the proper day deposited in the post-office, properly addressed in respect to name and post-office, no further proof

[1] Lawson v. Sherwood, 1 Stark. 314 (2 E. C. L. R.) In Friend v. Wilkinson & Hunt, 9 Grat. 31, two bills payable in Cincinnati were protested for non-payment, on February 1st, 1850, and notice was due to the Bank of Virginia, at Charleston, Kanawha county, Va., which had transmitted it for collection. Judge Allen, who rendered the opinion of the Court, said: "A notice of protest dated at Cincinnati on the 1st of February, 1850, was sent by mail to the cashier of the Bank of Virginia, at Charleston, Kanawha county, Va., and was received on the night of the 7th of February, inclosed in a letter postmarked Cincinnati, Ohio, and was handed to Friend, the indorser, on the next day. It was further proved that a letter would arrive at Charleston in four or five days after it was mailed in Cincinnati, if it came by the direct route. If sent by another route, a letter might be ten or twelve days on the way; or that it might be, and letters sometimes were, delayed at Chilicothe, Ohio, by the regulations in regard to the departure of the mail on the regular route from Cincinnati. Upon this proof the question arises whether Friend had due notice of the dishonor of the bill. The Bank of Virginia, at Charleston, Kanawha, is to be treated as a distinct holder, the bill having been placed there for presentment and collection; and notice was given by it in due time after it was received from Cincinnati. The party not residing in or near the city of Cincinnati, a notice sent by the mail of the next day, or the next practicable mail, would be sufficient, and the burden of proving a reasonable notice is on the plaintiff. It is, where notice is required, a condition precedent to his right to recover, and he must show a strict performance. In this case it does not appear whether there was a daily mail between Cincinnati and Charleston or not, nor when the notice was put in the post-office to be mailed. It is dated on the 1st and was received on the night of the 7th of February; and the proof is that a letter would arrive at Charleston in four or five days after it was mailed at Cincinnati if it came by the direct route. The notice therefore might have been placed in the office and mailed on the morning of the 4th, and have arrived after night on the 7th, according to this evidence. Being protested on the 1st, it should have been placed in the office to be sent by the mail of the next day, unless that was Sunday, and if so, by the mail of the third of February if there was such mail, or if not, by the next practicable mail; and it was incumbent on the plaintiff below to show the time it was so placed in the office to be mailed. * * * The notice may have been put in the office to be mailed on the 2d, and not have been received until the night of the 7th; if so, it would have been sufficient; but it might have been put in the office and mailed on the 3d or 4th and received at the same time; if so, it was too late, unless that was the first mail after the dishonor of the bill. And these were matters which the plaintiff were bound to prove, and probably could have done so by an examination of the notary."

is necessary, as due diligence will then have been exercised.[1] If notice be given by letter, its contents may be shown without a notice to produce the letter.[2] If it were given by one of two duplicate notices, evidence may be given of sending one, and then the other offered to the jury without notice to produce the one sent.[3] A finding that a notice the contents of which are unknown was served is not equivalent to finding that notice of protest, much less that sufficient notice of protest, was served.[4]

§ 1052. A postmark is *prima facie*,[5] but not conclusive[6] evidence that notice was mailed on the day designated; and when one puts a letter in the mail on the day that it ought to be received he must show that it was posted in time to be received on that day.[7] Genuineness of the postmark may be proved by any witness, whether a post-office employee or not.[8]

§ 1053. When there are a number of parties entitled to notice it is sufficient in order to hold any one of them bound,

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[1] Bussard v. Levering, 6 Wheat. 102; Dickens v. Beal, 10 Pet. 572; Shed v. Brett, 1 Pick. 401.

[2] Eagle Bank v. Chapin, 3 Pick. 180; Lindenberger v. Beall, 6 Wheat. 104; Leavitt v. Simes, 3 N. H. 14; Kine v. Beaumont, 3 Brod. & B. 288; 7 J. B. Moore, 112; Roberts v. Bradshaw, 1 Stark. 28, overruling earlier cases; 2 Parsons N. & B. 490, note.

[3] Ackland v. Pearce, 3 Camp. 599; Roberts v. Bradshaw, 1 Stark. 28; 2 Parsons N. & B. 491.

[4] Couch v. Sherrill, 17 Kansas, 622, Brewer, J.: "There is no presumption in favor of the action of the notary as official action, because it is no part of his official duty as notary to serve notice. If he serve any notice it is as agent of the holder, and not as notary. Hence, the finding as to notice is to be treated as though notice had been served by the holder. Now what notice was served? * * * It does not even appear to have been notice of protest."

[5] Early v. Preston, 1 Pat. & Heath, 228; Crawford v. Branch Bank, 1 Ala. 205; New Haven Co. Bank v. Mitchell, 15 Conn. 206; Arcangelo v. Thompson, 2 Camp. 620; Rex v. Plumer, Rus. & Ry. 264; Langdon v. Hulls, 5 Esp. 156; Fletcher v. Braddyll, 3 Stark. 64.

[6] Stocken v. Collin, 7 M. & W. 545; 9 C. & P. 653 (38 E. C. L. R.)

[7] Fowler v. Henden, 4 Tyrw. 1002; Byles on Bills (Sharswood's ed.) [*275], 427.

[8] Woodcock v. Houldsworth, 16 M. & W. 124; Fletcher v. Braddyll, 3 Stark. 64.

to show that notice reached him in such a time as it would occupy for the intermediate parties to transmit it to him in due course of the mails, allowing each one his day.[1] But the courts cannot take judicial cognizance of the course of the mails, and that must be shown by the plaintiff.[2] It would be better for him also to show that he gave notice in due season to his immediate indorser.[3] When the plaintiff has shown that notice reached the remote party within the time which would regularly be consumed, it will be for him to show a defective link in the chain of notices, if any there be.

§ 1054. When the mail is the proper channel for the communication of notice, it is not necessary to show the distinct fact that the particular letter containing the notice was put in the mail, by ocular evidence thereof. Proof that notice was put with letters for the post-office by one clerk, and that the letters of that day were deposited by another clerk, would be sufficient.[4] And it would likewise be sufficient to show that it was put with letters customarily made up in the usual course of business for the postman, and that he invariably carried all the letters found upon the table.[5] But it has been held that proof that a letter was put on the table with others, and that it was the regular course of business for the porter to take them to the post-office, would not be sufficient —at least unless it were proved that the porter always carried the letters so prepared, which, without any distinct remembrance as to that particular one, the court intimated would be satisfactory.[6]

Delivering the notice to the assistant postmaster in an adjoining room would suffice, that being the usage of the

[1] Jones v. Wardell, 6 W. & S. 399; Etting v. Schuylkill Bank, 2 Penn. St. R. 345; Marsh v. Maxwell, 2 Camp. 210.

[2] Friend v. Wilkinson, 9 Grat. 31; Carter v. Burley, 9 N. H. 558; Early v. Preston, 2 Pat. & Heath, 228.

[3] 1 Parsons N. & B. 518.

[4] Commercial Bank v. Strong, 28 Vt. 316.

[5] Skilbeck v. Garbett, 7 Q. B. 846; see Brailsford v. Williams, 15 Md. 150; Flack v. Green, 3 Gill & J. 474; Miller v. Hackles, 5 Johns. 375.

[6] Hetherington v. Kemp. 4 Camp. 193; Byles on Bills (Sharswood's ed.), 420.

place;[1] but a clerk's statement that notice was put in, he not remembering whether by himself or another, would not.[2]

§ 1055. *The protest of a foreign bill* is, by the law merchant, evidence of its presentment and dishonor; but except where it is so provided by statute, it is not evidence in respect to notice; and where statute does not authorise the admission of the certificate of protest as evidence of notice, it is usual to take the notary's deposition to prove it, or that of some other witness, or to call the notary or witness to testify *ore tenus* at the trial.[3]

Statutory enactments have very generally changed this doctrine of the law merchant, and though sustained by authority, a distinguished author has denied it.[4]

If the notary has kept no record of the notice, his oral testimony is competent to prove the contents.[5]

§ 1056. Where a notary testified that it was usual for him to send notices of dishonor on the evening of the day of protest, and he had no doubt it was duly done in this instance, it was held sufficient evidence of notice.[6] But where a notary testified as to a similar habit, and presumed notice was given, but had no distinct recollection, it was held otherwise.[7] A clerk's conclusion from circumstances which he remembered, though he did not recollect having delivered notice, that he had done so was thought sufficient in another case.[8] It was likewise held in Maine, that where the notary testified he had prepared notice and given it to S. to de-

[1] Mount Vernon Bank v. Holden, 2 R. I. 467.

[2] Hawkes v. Salter, 1 M. & P. 750.

[3] See Chapter XXVIII, on Protest, Sec. V, § 960 *et seq.*; Harrison v. Robinson, 4 How. 336; Lambert v. Ghiselin, 9 How. 532; Dickens v. Beal, 10 Pet. 582; Miller v. Hackley, 5 Johns. 384; Lloyd v. McGair, 3 Barr, 482; Walker v. Turner, 3 Grat. 536.

[4] 2 Parsons N. & B. 498; see Chapter XXVIII, on Protest, Sec. IV.

[5] Terbell v. Jones, 15 Wis. 253.

[6] Miller v. Hackley, 5 Johns. 375; see also Carson v. Bank of the State, 4 Ala. 148.

[7] Hoff v. Baldwin, 12 Mart. (La.) 699; see also Bullard v. Wilson, 17 Mart. (La.) 196.

[8] New Haven Co. Bank v. Mitchell, 15 Conn. 206.

liver, and S. had no recollection of that particular notice, but it was his habit to deliver notices generally, the usage operated sufficient evidence of notice.[1]

§ 1057. *When the notary who gave the notice is dead*, the entries respecting it in his books are good secondary evidence,[2] even where protest is not required by law, as in the case of a note or an inland bill.[3] But the entry can prove no more than what it states; and if it omits to state the residence of the indorser, the post-office to which notice was addressed, or any other material fact, it cannot be inferred.[4] The notary's register would be no evidence after his death if the entries were made by a clerk still living, and although he be absent and out of reach,[5] but if such clerk were deceased it would be.[6] Entries made by officials deceased at the time of trial are in general admissible, and the principle has been held to apply to the case of deceased messengers and book-keepers,[7] cashiers of banks,[8] and clerks,[9] as well as to notaries.[10] "The rule is," says Bronson, J., "that entries and memoranda made in the usual course of business by notaries, clerks, and other persons, may be received in evidence after the death of the persons who made them."[11]

§ 1058. When the facts are ascertained, it is simply a question of law for the court to determine whether or not reasonable diligence has been exercised;[12] but when the facts

[1] Union Bank v. Stone, 50 Me. 595. [2] Robins v. Pinckard, 5 Sm. & M. 51.

[3] Nicholls v. Webb, 8 Wheat. 326; Butler v. Webb, 2 Wend. 369. See Chapter XXVIII, on Protest, Sec. IV.

[4] Farmers' Bank v. Duvall, 7 Gill. & J. 78; Halliday v. Martinet, 20 Johns. 168.

[5] Wilbur v. Selden, 6 Cow. 162. [6] Gawtry v. Doane, 51 N. Y. 90.

[7] Welsh v. Barratt, 15 Mass. 380. [8] Nichols v. Goldsmith, 7 Wend. 160.

[9] Ocean National Bank v. Carll, 16 N. Y. S. C. (10 Hun), 241.

[10] Halliday v. Martinet, 20 Johns. 168; Nicholls v. Webb, 8 Wheat. 326; Nichols v. Goldsmith, 7 Wend. 160; Homes v. Smith, 16 Me. 181; Price v. Torrington, 1 Salk. 285.

[11] Brewster v. Doane, 2 Hill, 537.

[12] Bank of Columbia v. Lawrence, 1 Pet. 578; Harris v. Robinson, 4 How. 336; Walker v. Stetson, 14 Ohio St. 89; Belden v. Lamb, 17 Conn. 442; Wheeler v. Field, 6 Metc. 290; Bank of Utica v. Bender, 21 Wend. 643; Rhett v. Poe, 2 How. 457; Edwards on Bills, 648; Lane v. Bank of West Tennessee, 9 Heisk. 419.

are disputed, it is a question for the jury upon hypothetical instructions of the court.[1]

When due diligence has been exercised and notice sent accordingly, the holder is not obliged to give any further notice, although he afterward discovers that the notice was sent to the wrong place. Such is the doctrine of the United States Supreme Court, which has said on this subject, where the holder, after due inquiry, sent notice: "The liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit against him the next day. Could that right be divested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary."[2] In New York a contrary view has been taken, but without apparent confidence,[3] and it would be more reasonable to regard the holder as having complied with his obligation when he had acted with due diligence to ascertain the indorser's whereabouts.

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[1] See Chapter XVII, on Presentment for Acceptance, Sec. III, § 466, vol 1; and Chapter XX, on Presentment for Payment, Sec. III, § 612, vol. 1.

[2] Lambert v. Ghiselin, 9 How. 552.

[3] Beale v. Parish, 20 N. Y. 407, overruling 24 Barb. 213.

CHAPTER XXX.

CIRCUMSTANCES OF A GENERAL NATURE WHICH EXCUSE WANT OF PRESENTMENT, PROTEST AND NOTICE.

§ 1059. The circumstances of a general nature which excuse the holder when there has been a failure on his part to make due presentment of the bill or note to the drawee, acceptor or maker, or to convey due notice of dishonor to the drawer or indorser, may be classified as follows:

(1) The breaking out of a war between the country of the holder and that of the party to whom presentment should be made or notice given.

(2) Public and positive prohibitions of commercial intercourse between the countries of the holder and that of the party to whom presentment should be made or notice given.

(3) The occupation of the country where the parties live, or where the bill or note is payable, by a public enemy, or by military forces, which obstructs or suspends commercial intercourse.

(4) Political disturbances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade.

(5) The prevalence of a malignant epidemic disease, which suspends the ordinary operations of business.

(6) Overwhelming calamity, or unavoidable accident, which obstructs the usual channels of communication.

These circumstances are of a character not affecting the individual peculiarly, but having such a general influence upon the country or the community as to impede and prevent the ordinary pursuits of business, or obstruct the methods of communication, and they are recognized, almost if not quite universally, as exonerating those who come under their operation from the performance of the obligations in respect to negotiable instruments with which they interfere. The clas-

sification of those circumstances which we have adopted is, with some alterations which confine them strictly within the description of "general circumstances," substantially that which is found in the work of Story on Promissory Notes, and which has been sanctioned by more recent writers, and by a number of adjudicated cases.[1]

SECTION I.

WAR, INTERDICTION OF INTERCOURSE, AND OCCUPATION OF COUNTRY BY PUBLIC ENEMY.

§ 1060. *In the first place, as to breaking out of war.*—A declaration of war between the country where the holder is domiciled and that where the party to whom presentment should be made or notice given is domiciled, or the breaking out of hostilities between such countries, operates as an interdiction of all commercial intercourse; and all communication between the subjects of the belligerents, or parties on opposite sides of the belligerent line, is prohibited. This is a general principle of the law of nations, recognized and applied to all kinds of transactions;[2] and it constitutes a clear and admitted justification of the omission to make due presentment of the bill or note or to give notice, during the continuance of hostilities or the suspension and prohibition of intercourse.[3] Indeed, war is not only an excuse for not giving notice, but

[1] Story on Notes, §§ 205, 257, 356; see also Story on Bills, §§ 234, 327; 1 Parsons N. & B. 460; Edwards on Bills, 492; House v. Adams, 48 Penn. St. 261; Apperson v. Union Bank, 4 Cold. 445 (as to notice).

[2] U. S. v. Grossmeyer, 9 Wall. 75; The William Bagaley, 5 Wall. 377; Alexander's Cotton, 2 Wall. 404; Scholefield v. Eichelberger, 7 Pet. 586; Woods v. Wilder, 43 N. Y. 164; Wheaton Int. Law, § 317; 1 Kent Com. 67.

[3] Patience v. Townley, 2 J. P. Smith, 224 (King's Bench, 1806); House v. Adams, 48 Penn. St. 261; Morgan v. Bank of Louisville, 4 Bush (Ky.), 82; Berry v. Southern Bank, 2 Duv. 379; Bell v. Hall's Exr's, 2 Id. 288; Apperson v. Union Bank, 4 Cold. 445; Norris v. Despard, 28 Md. 491; James v. Wade, 21 La. Ann. 548 (1869), (there being suspension of mail service and commercial intercourse); Durden v. Smith, 44 Miss. 518; Shaw v. Neal, 19 La. Ann. 156; Billgerry v. Branch, 19 Grat. 393; Farmers' Bank v. Gunnell, 26 Grat. 138; Bynum v. Apperson, 9 Heisk. 632; Harden v. Boyce, 59 Barb. 427; Story on Notes, § 263; Story on Bills, § 234; Thomson on Bills (Wilson's ed.), 280.

entirely precludes the reason and necessity of it; and if notice be put in the post-office, addressed to a party on the other side of the hostile line. it would be an utterly void act, unless it was proved that there was a general usage of the postal department to preserve letters deposited and forward them to their destination on the re-opening of intercourse.[1] The rule applies to protest and all of the proceedings usual at maturity of the note.[2]

§ 1061. In respect to the late conflict between the United States and the Confederate States, it has been held that although a state of hostility existed and the war had become flagrant, nevertheless, that as commercial intercourse was not interdicted until August 16th, 1861, by proclamation of President Lincoln, contracts between persons in the Union and in the seceded States, were not until that time illegal.[3] The fact that Congress had authorized such proclamation on the 13th of July, 1861, has not been considered to alter the case; and where a bill drawn in Missouri on New Orleans was protested on July 17th, 1861, it was held that the condition of the country was no excuse for failure to give notice[4] to parties in Missouri, that State being within the Federal, and New Orleans in the Confederate, lines.

§ 1062. But these decisions are utterly at variance with the current of authorities and with the principle on which they rest. War declared or flagrant operates, as said by Chancellor Kent, an inderdiction "to all communication, to all locomotive intercourse, to a state of utter seclusion to any

[1] Harden v. Boyce, 59 Barb. 427; Shaw v. Neal, 19 La. Ann. 156; James v. Wade, 21 La. Ann. 548; Billgerry v. Branch, 19 Grat. 393; Farmers' Bank v. Gunnell, 26 Grat. 132; McVeigh v. Bank of Old Dominion, 26 Grat. 785. See *ante*, Chapter VIII, Sec. II, §§ 216, 222, vol 1.

[2] McVeigh v. Bank of Old Dominion, 26 Grat. 838.

[3] Leathers v. Commercial Ins. Co. 2 Bush (Ky.), 296.

[4] Union National Bank v. Marr's Adm'r 6 Bush, 615, Hardin, J., saying: "Notwithstanding the disturbed condition of the country which we know judicially to have existed when the bill was protested, it does not appear that at that time there was such obstruction of intercommunication between the southern and border States as to prevent the transmission and delivery of notice of dishonor of the bill."

intercourse but one of open hostility, to any meeting but in actual combat."[1] The policy of the rule is to close all relations between the antagonists but those of antagonism, and no express prohibition is necessary to put it in force. In Virginia, where it appeared that after indorsing several negotiable notes, the indorser, who resided in Alexandria, left the city, which had been, in the meantime, permanently occupied by the U. S. forces, and went to Richmond, where he remained until the end of the Confederate war; that he left a white servant at his residence in Alexandria, and his usual place of business was the bank at which the notes were discounted, and of which he was president; and that at the maturity of the notes they were protested;—it was held that notices of dishonor left at his house with the servant in charge, and at his place of business at the bank, were insufficient, and no other notices having been given, that he was discharged from all liability.[2]

§ 1063. *In the second place, as to public interdiction of commerce and intercourse.*—The interdiction of intercourse between the countries of the holder and that of the party to whom presentment should be made, would operate as a direct prohibition upon the holder, as much so as a declaration or open state of war, and it would violate every principle of comity and justice to subject him to a forfeiture of any right which he could only pursue in violation of law; and this is therefore a universally recognized excuse for not making a due presentment.[3] The same principle applies as to notice.

§ 1064. *In the third place, as to occupation of country by public enemy, or military disturbances.*—Where the occupation of the country by the public enemy is of such a character as to sever the parties from each other by a hostile line, the same principle applies as if they were in fact domiciled in

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[1] Griswold v. Waddington, 19 Johns. 438. See *ante*, Chapter VIII, Sec. II, § 216, *et seq.*, vol. 1; and also Billgerry v. Branch, 19 Grat. 393; McVeigh v. Bank of Old Dominion, 26 Grat. 785.

[2] McVeigh v. Bank of Old Dominion, 26 Grat. 785.

[3] Story on Notes, §§ 257, 263; 1 Parsons N. & B. 461.

the different countries; for that portion of territory which becomes in the temporary occupation of the enemy is, during such occupation, deemed the enemy's country. But there may be cases in which both parties are thrown within the enemy's lines, or left within the lines of their own country, in which intercourse between them is rendered dangerous or impracticable by military movements; or by a general disturbance and interruption of business communication arising out of them. Under such circumstances, the obstacles which will excuse the want of due presentment and notice need not be of such a degree or extent as to render travel and intercourse impossible. It is enough if they be of the degree and character which deter men of ordinary prudence, energy and courage, from encountering them in the prosecution of business in respect to which they owe an active and earnest duty, and feel an active and earnest interest.[1] The circumstance that the place was in immediate danger of occupation by the enemy, or of becoming the scene of a battle, *flagrante bello*, would suffice as an excuse.[2] In a Virginia case the circumstances of a recent occupation of a town by the enemy's forces were thought insufficient to excuse a failure of protest and notice four days after their departure.[3]

SECTION II.

POLITICAL DISTURBANCE, EPIDEMIC DISEASE, AND OVERWHELMING CALAMITY OR ACCIDENT.

§ 1065. *In the fourth place, as to political disturbances*, which virtually interrupt and obstruct the ordinary negotiations of trade, it is recognized that such disturbances constitute a sufficient excuse for want of presentment or notice, upon the same principle that controls in cases where it is prevented by calamities, military operations, or interdictions

[1] Polk v. Spinks, 5 Cold. 431.

[2] Story on Notes, § 261. See Blain & Hoge v. Wilson, 28 Grat. 172.

[3] Tardy v. Boyd, 26 Grat. 632.

of commerce.[1] We should say that the case of a riot or insurrection in which a city was taken possession of by the outlaws, or the closing of houses and suspension of business became necessary to the protection of property or life, would present a striking instance of such a disturbance. But the mere condition of political and military troubles in a country, producing an alarming and unsettled state of affairs, would be insufficient.[2]

§ 1066. *In the fifth place, as to the prevalence of a malignant disease.*—The prevalence of a malignant, contagious or infectious disease, such as the cholera, yellow fever, the plague, or small-pox, which has become so extensive as to suspend all commercial business and intercourse, or to render it very hazardous to enter into the infected district, is recognized by the text writers as a sufficient excuse for not doing any act which would require an entry into such district.[3] And every consideration of public policy and of humanity must sanction this rule. To require communication with the infected district is to widen the avenue for the extension of the disease, and to require the holder to imperil his life for such a purpose would be a cruel imposition. In New York it has been accordingly held that the prevalence of a contagious malignant fever in the place of residence of the parties, which occasioned a stoppage of business, was a sufficient excuse for not giving notice until November of a protest made in September;[4] and the decision seems to us entirely worthy of approval.[5] In that State the subject is now regulated by statute.

§ 1067. *In the sixth place, as to overwhelming calamity and unavoidable accident.*—We have to consider those circumstances of overwhelming calamity, or inevitable accident

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[1] Story on Notes, § 261. See Blain & Hoge v. Wilson, 28 Grat. 172.

[2] Apperson v. Union Bank, 4 Cold. 446.

[3] 1 Parsons N. & B. 460, 531; Edwards on Bills, 492; Story on Bills, § 308; Story on Notes, § 260.

[4] Tunno v. Lague, 2 Johns. Cas. 1.

[5] But see Roosevelt v. Woodhull, Anth. 35.

which suddenly intervene, and, without any default on the holder's part, render it impossible or impracticable for him to make due presentment or to give due notice. The principle contained in the maxim of the civil law, *impossibilium nulla obligatio est*, is equally applicable to the law of bills and notes, which requires only reasonable diligence on the part of the holder to fix the liability of drawer and indorsers; and it does not countenance a forfeiture of his rights when overruling causes constrain him. And therefore although there is but meager illustration of the doctrine in the cases touching negotiable instruments, we find it universally asserted that the holder is exonerated when a calamity or accident of the kind described prevents him.[1]

Among the circumstances of this class may be enumerated freshets which carry away bridges and destroy the means of communication; violent snow storms which render the roads impassable; tornadoes and earthquakes which paralyze all affairs for the time being, or render intercourse impracticable.

§ 1068. According to the strict principles of the common law, contracts to do particular things, and at particular times, are absolute in their nature; and as a general rule accident or casualty would not excuse their non-performance. But by the law merchant, it must be remembered, that although due demand and notice are conditions precedent to the liability of drawers and indorsers, the contract of the holder is only that he will exercise due diligence to make such demand and give such notice; and this implies an exception in favor of those unavoidable accidents which prevent it.[2] Upon this principle, if the holder confide the bill or note to the public mail, as a means of transmitting it for presentment, and with-

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[1] Chitty on Bills (13th Am. ed.) [*451], 509; Edwards on Bills, 492; Thomson on Bills (Wilson's ed.) 280, 368; Story on Notes, § 258; Story on Bills, §§ 283, 286, 308, 327, 365; Hilton v. Shepherd, 6 East, 16 (respecting notice); Windham Bank v. Norton, 22 Conn. 213.

[2] Lord Ellenborough, in Patience v. Townly, 2 J. P. Smith, 223; Windham Bank v. Norton, 22 Conn. 213.

out negligence on his part, he could not justly be liable for any delay arising out of any accident, miscarriage or default in the postal service.[1] And as has been said, speaking of a bill, "such mode of transmission is in accordance with the general commercial usage and law in the case of paper of this description. Indeed, it is recommended by the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance." And accordingly it was held in the case quoted, where the bill had been deposited in the post-office in time for due presentment in due course of mail, and by mistake of the postal clerk in misdirecting the package, it did not duly reach its destination, that the delay did not discharge the indorser.[2] But if the holder has been himself in fault in causing the delay in transmission by the mail, or blame is imputable to him in the misdirection of the bill, he will not be excused for failure in prompt presentment.[3]

§ 1069. It should distinctly appear when an accident, or calamity or operation of superior force is brought forward as an excuse for non-presentment, that it has the effect to prevent its being duly made. The mere fact that a violent storm occurred at the time, unless it also appeared that it obstructed communication, would not suffice.[4] But if there

[1] Windham Bank v. Norton, 22 Conn. 213.

[2] Windham Bank v. Norton, 22 Conn. 213, Storrs, J.

[3] Schofield v. Bayard, 3 Wend. 488. In this case the holders of a bill payable in London, by mistake of their own sent it to Liverpool for presentment. Their agents sent it back by mail in time to reach the holders, and be by them sent to London, if it had reached them in due season. But by a mistake of the post-office it did not reach the holders in time to be reforwarded by them in due season. The court held that the fault was in the holders, and that failure of due presentment could not be excused. Savage, C. J., saying: "This presents no impossibility if due diligence had been used. The plaintiffs should not have sent the bill to Liverpool at all. It is true, that, after the letter containing it had been left at Liverpool, it could not have reached London in due season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool they should have sent it to London, and then it would have been in season, and probably would have been paid."

[4] Edwards on Bills, 493.

were a general calamity involving a community, it might be different. Doubtless, the recent conflagrations suddenly laying large portions of Boston and Chicago in ruins will give rise to questions of this kind. When communities are visited by such overwhelming and appalling calamities as these, all thoughts of business must give way to considerations of self-preservation and humanity; and should cases involving their effect be presented to the courts, it would be safe to predict that this doctrine of excuses will find a liberal application. The excuse of inevitable accident or calamity will apply as well to protest when it is thereby prevented, and if it is made as soon afterward as it reasonably can be, that will suffice.[1]

§ 1070. *When impediment ceases, duty to make demand or give notice revives.*—These excuses—war, military or political disturbance, interdiction of commerce, prevalence of disease, overwhelming accidents, et cetera—do not justify a total dispensation of demand and notice, but only excuse the delay which these circumstances may occasion. As soon as the impediment ceases, the duty revives; and if demand and notice be not speedily made, the holder is in default, and drawers and indorsers are discharged.[2] Thus, where the holder of a bill in New York delayed, for several months after restoration of commercial intercourse between New York and New Orleans (the former being in the United States, and the latter in the Confederate States during the war of secession), to present the bill to the acceptor in New Orleans for payment, it was held that the drawer was discharged.[3] In Maryland, it was said by Stewart, J.: "There

[1] Story on Bills, § 283.

[2] Farmers' Bank v. Gunnell, 26 Grat. 132; Tarby v. Boyd, 26 Grat. 631; McVeigh v. Bank of Old Dominion, 26 Grat. 785; Bynum v. Apperson, 9 Heiskell, 632; Lane v. Bank of W. T. 9 Heiskell, 419; Billgerry v. Branch, 19 Grat. 393; Apperson v. Union Bank, 4 Cold. 445; Morgan v. Bank of Louisville, 4 Bush (Ky.), 82; House v. Adams, 48 Penn. St. 266; James v. Wade, 21 La. Ann. 548; Peters v. Hobbs, 25 Ark. 67; Durden v. Smith, 44 Miss. 552; Dunbar v. Tyler, 44 Miss. 10; Shaw v. Neal, 19 La. Ann. 156.

[3] Durden v. Smith, 44 Miss. 552; see Dunbar v. Tyler, 44 Miss. 10.

must be the earliest possible presentment when impediment ceased."[1]

§ 1071. In Pennsylvania,[2] it appeared that two bills which were drawn (and indorsed) in Pennsylvania upon a house in New Orleans, were duly protested on the 11th and 29th of July, 1861, respectively, in that city. Communication was suspended between New Orleans and Pittsburg, where the parties entitled to notice resided, until July 1st, 1862, when the first mail was received at the latter place. Under these circumstances, and there being considerable intervals between the mails, notice received at Pittsburg, July 11th, 1862, was considered within reasonable time, and held sufficient. But in Kentucky,[3] where there was a delay of over five months in forwarding notice after the re-opening of communication, which had been suspended, it was said it could not be "deemed reasonable nor accounted for by the then political condition of the country."

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[1] Norris v. Despard, 28 Md. 491.
[2] House v. Adams, 48 Penn. St. 266.
[3] Morgan v. Bank of Louisville, 4 Bush, 82.

CHAPTER XXXI.

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN ORIGINAL ABSENCE OF RIGHT TO REQUIRE PRESENTMENT, PROTEST OR NOTICE.

§ 1072. Besides the circumstances of a general nature which excuse delay or absence of presentment, protest or notice, there are some of a special nature which have the like effect. These special circumstances may be classified as follows: I. Circumstances showing an original absence of right to require these steps to be taken. II. Circumstances arising from special acts of waiver. III. Circumstances which show an inability on the part of the holder to make due presentment or protest, or give notice. IV. Special circumstances arising from the conduct of the party. V. Special waivers by promises to pay and part payments after maturity. These circumstances, thus classified, and ramifying into many details, will be now separately considered.

SECTION I.

DRAWING WITHOUT RIGHT TO SO DO, OR REASONABLE GROUND TO EXPECT THAT BILL WILL BE HONORED.

§ 1073. In the *first* place, when the drawer has drawn the bill without the right to do so, or without any reasonable grounds to expect that the drawee would honor it, the omission of the holder to make a due presentment of it for acceptance or payment (no acceptance intervening), or to give the drawer due notice of its dishonor by the drawee, will be excused.[1] This doctrine rests upon the ground that the drawer has committed fraud or folly in undertaking that the drawee would honor his bill, when he had no right or

[1] Chitty on Bills (13th Am. ed.) [*436], 490; Story on Bills, §§ 280, 375.

reasonable ground to expect it; and that he can suffer no loss or injury from the failure of the holder to make a presentment to the drawee, which would naturally be fruitless, or to give him, the drawer, notice of a dishonor which he must have known by anticipation.

This excuse applies alike to presentment, protest and notice, for the reason that all the steps ordinarily taken to fix the drawer's liability are predicated upon the assumption that he has drawn the bill in good faith, and after proper provision for its payment, and when such is not the case he is absolutely liable. The authorities to this effect are overwhelming in number as they are clear in principle;[1] but there are a few cases which hold that it does not apply to presentment, for the reason that the drawee might have accepted or paid for the honor of the drawer.[2]

So any fraud relating to the instrument committed by the drawer will excuse want of due diligence, presentment or notice. Thus, if having obtained a draft or check, he should sell it for value, and before its presentment should obtain a duplicate and sell it for an additional sum, or draw out the money upon it, he would be absolutely liable on the first draft or check.[3]

§ 1074. *As to lack of funds.*—It was held in an early English case, which has been much quoted, that when the drawer had no funds in the hands of the drawee, no notice would be necessary to charge him, for the reason, as assigned by one judge, that drawing a bill in such a case is a fraud, and, as assigned by another, that no injury could result to the drawer.[4] And the rule is often laid down in the language that the want of funds excuses the holder from giving notice;[5] the statement of it in this form arising from the fact that, when the bill has been improvidently drawn, it turns out

[1] 1 Parsons N. & B. 530, note m; Story on Bills, § 280.

[2] Cruger v. Armstrong, 3 Johns. Cas. 5, Radcliff, J.; English v. Wall, 12 Rob. (La.) 132.

[3] Moody v. Mack. 43 Mo. 212.

[4] Beckerdike v. Bollman, 1 T. R. 405 (1786).

[5] Edwards on Bills, 640.

that there were no funds to meet it. But the converse proposition is not true, that, whenever there are no funds provided to meet the bill, the drawer was improvident in drawing it. The drawee may have promised to accept or pay for the drawer's accommodation, or have come under an obligation, founded on legal consideration, to do so. And the true criterion of the right to require due demand and notice is, not whether the drawer had funds in the drawee's hands, but whether or not the drawer had a right to expect or require that the drawee would honor his bill.[1] Whenever such right exists, the drawer is discharged if there be not due demand and notice, and not otherwise. In Maryland, the defendant drew a bill of exchange against a cargo of wheat and indorsed and delivered to plaintiffs the bill of exchange, and also the bill of lading of the cargo, as collateral security for the acceptance and payment of the bill of exchange, authorizing them, in case they thought it necessary, to sell the cargo and apply the proceeds to payment of the bill. The drawees declined to accept, on the ground that they were not bound to do so under the agreement with the drawers, unless they were put in possession of the bill of lading. The Court held that presentment and notice of non-acceptance were excused, as the drawers had not complied with their contract with the drawees, had intercepted the means of payment, and had no reasonable ground to expect acceptance of the bill.[2]

§ 1075. If the drawer have funds in the drawee's hands he will be entitled to strict presentment and notice, even though the drawee represent, when the bill is drawn, that he

[1] French v. Bank of Columbia, 10 Pet. 572; French v. Bank of Columbia, 4 Cranch, 141; Hopkirk v. Page, 2 Brock. 20; Miser v. Trovinger, 7 Ohio St. 281; McRae v. Rhodes, 22 Ark. 315; Schuchardt v. Hall, 36 Md. 600; Louisiana State Bank v. Buhler, 22 La. Ann. 83; Farmers' Bank v. Vanmeter, 4 Rand. 553; Claridge v. Dalton, 4 Maule & S. 226; Golladay v. Bank of Union, 2 Head, 557; Oliver v. Bank of Tennessee, 11 Humph. 74; Edwards on Bills, 640; *contra*, Foard v. Womack, 2 Ala. 368; Tarver v. Nance, 5 Ala. 712; Welch v. B. C. Taylor Mfg. Co. 82 Ill. 581. Dickey, J.: "It is sufficient that the drawers in good faith supposed the drawee was their debtor to that amount."

[2] Schuchardt v. Hall, 36 Md. 590.

will not be able to provide for it, and that the drawer must make provision to meet it.[1] And it will be no excuse for want of presentment or notice that the drawee is his creditor for a larger amount than he is his debtor.[2] The want of injury to the drawer is never now admitted as an excuse for want of demand or notice.[3]

If the funds of the drawer be attached or otherwise intercepted in the drawee's hands after the bill is drawn, it would not affect the drawer's right to demand and notice.[4]

§ 1076. *When drawer has right to draw.*—Among the circumstances under which the drawer has a right to expect that his bill will be honored, and consequently to require strict presentment and notice, may be named: When he draws before a consignment which he has made comes to hand, and in anticipation of it;[5] or upon a consignment insufficient by reason of depreciation in value, or other loss;[6] or when there is a fluctuating balance or running account between him and the drawee;[7] or when the drawee is accustomed, in the course of trade, to honor the drawer's bills under similar circumstances, or without regard to the state of their accounts;[8] or where a third party has promised to pro-

[1] Prideaux v. Collier, 2 Stark, 57; Clegg v. Cotton, 3 Bos. & P. 239; Staples v. Okines, 1 Esp. 332. In this case the acceptor was indebted to the drawer at the time the bill was drawn, but then informed the latter that he would not be able to provide for the bill. It was understood between them that the drawer was to provide for the bill when due. Notice to the drawer was held necessary. Lord Kenyon said: "The law was general, only exempting the party from the necessity of giving notice where the drawee had no effects; and as here the drawee was indebted to the defendant, on whom the bill was drawn, and so, in fact, had effects in hand, and if he had had effects in hand when the bill became due, would have taken it up, he was of opinion that notice was necessary." Story on Bills, § 375.

[2] Blackham v. Doren, 2 Camp. N. P. C. 503; Bayley on Bills, 195.

[3] See *post*, Chapter XXXVI, Sec. I, § 1170.

[4] Stanton v. Blossom, 14 Mass. 116.

[5] Dickens v. Beal, 10 Pet. 572; Grosvenor v. Stone, 8 Pick. 79; Orear v. McDonald, 9 Gill, 350.

[6] Robinson v. Ames, 20 Johns. 146; Williams v. Brashear, 19 La. 370; Rucker v. Hiller, 16 East, 53; Robins v. Gibson, 3 Camp. 384.

[7] Blackham v. Doren, 2 Camp. 503; Hammond v. Dufrene, 3 Camp. 145.

[8] Adams v. Darby, 28 Mo. 162; Dickens v. Beal, 10 Pet. 572; Dunbar v. Tyler, 44 Miss. 1.

vide the drawee with funds;[1] or the drawee has authorized the drawing of the bill,[2] though not so if the terms of the bill exceeded the authority.[3]

§ 1077. And it may be stated that want of funds is no excuse for want of demand or notice, whenever the drawer or indorser, as the case might be, would be entitled, upon taking up the bill, to sue either the acceptor or any other party for the amount due.[4] Thus, if the bill were drawn for the acceptor's accommodation,[5] or for the accommodation of the payee, or of a subsequent indorsee,[6] the drawer is entitled to strict presentment and notice.

So the drawer is entitled to notice when he has placed securities in the hands of the drawee, with the reasonable expectation that the drawee would accept, or pay on the credit thereof, or provide funds out of them for payment.[7] But not where he has supplied the drawee with property on a credit, and the credit would not expire until after maturity of the bill.[8]

§ 1078. *As to the time at which the reasonable expectation that the bill will be honored must exist*, the rule on the subject is differently stated by different authorities. Mr. Chitty considers that if there were effects in the drawee's hands at any time between the drawing of the bill and its presentment and dishonor, the drawer should have notice;[9] while,

[1] Dickens v. Beal, 10 Pet. 572; French v. Bank of Columbia, 4 Cranch, 141; Lafitte v. Slatter, 6 Bing. 623; 4 Moore & P. 457.

[2] Walwyn v. St. Quintin, 1 Bos. & P. 652; Austin v. Rodman, 1 Hawks, 194; Orear v. McDonald, 9 Gill, 350; Dickens v. Beal, 10 Pet. 572; Hopkirk v. Page, 2 Brock. 20; Oliver v. Bank of Tennessee, 11 Humph. 74.

[3] Claridge v. Dalton, 4 Maule & S. 226.

[4] Chitty on Bills (13th Am. ed.) [*438], 493, 494; Edwards on Bills, 644.

[5] *Ex parte* Heath, 2 Ves. & B. 240; see Shirley v. Fellows, 9 Port. (Ala.) 300.

[6] Cory v. Scott, 3 B. & Ald. 619; Whitfield v. Savage, 2 Bos. & Pul. 277; Norton v. Pickering, 8 B. & C. 610; Brown v. Maffey, 15 East, 216. It was held at one time (in Walwyn v. St. Quintin, 1 Bos. & P. 652), that if the drawer had no effects in the drawee's hand, he would not be entitled to notice although the payee had; but in Norton v. Pickering the decision was overruled.

[7] Spooner v. Gardiner, Ry. & Mood. 84; *ex parte* Heath, 2 Ves. & B. 240; Chitty [*446–7]; Campbell v. Pettingill, 7 Greenl. 126.

[8] Claridge v. Dalton, 4 Maule & S. 226. [9] Chitty (13th Am. ed.) [*444], 500.

on the other hand, it is said that notice is unnecessary when at the time of the drawing there were no effects to meet the bill.[1]

But the *bona fide* expectation of the drawer based upon his relations with the drawee, and the provision he has made, or intends to make, and does make, are, it seems to us, the circumstances to be regarded. If he has no funds in the drawee's hands when he draws, and yet provides them before presentment, he should have notice.[2] If he had funds when he drew, but withdrew them before presentment, he forfeits the right to it.[3] If the drawer has any arrangement by which, at the time the bill is presented, he has a right to expect it to be honored, we should say he should have demand and notice.[4] For it would be presumed that such arrangement was contemplated when he drew.

§ 1079. *Where there is a running open account* between the parties, the drawer is entitled to require presentment and notice, although the balance due him may be less than the amount of the bill;[5] and it is very frequently said that where there are any funds, however insufficient, in the drawee's hands, failure of the holder in either particular is not excused.[6] But here the true criterion, as in all other

[1] French v. Bank of Columbia, 10 Pet. 572.

[2] Where the proceeds of a cargo were in the broker's hands, and he was to put the drawee in funds, the drawer was held entitled to notice. Robins v. Gibson, 3 Camp. 334. So where the drawer after acceptance and before maturity sent funds to the acceptor, having none when he drew in his hands. Hammond v. Dufresne, 3 Camp. 145. Lord Ellenborough, C. J., saying: "I think the drawer has a right to notice of the dishonor of a bill, if he has effects in the hands of the acceptor at any time before it comes due." Orear v. McDonald, 9 Gill, 350; Eichelberger v. Finley, 7 Har. & J. 381.

[3] See *post*, § 1081.

[4] See 1 Parsons N. & B. 548.

[5] Thackray v. Blackett, 3 Camp. 164; Legge v. Thorpe, 12 East, 171; Chitty (13th Am. ed.) [*444].

[6] Lacoste v. Harper, 3 La. Ann. 385. The bill was for $2,777, and the amount of funds $883. Slidell, J., said: "We are not aware of any authority extending the exemption of the necessity of notice where the drawee had funds in his hands at the maturity of the bill. Even if the funds be insufficient to cover the bill, the drawer is entitled to notice." See also Sutcliffe v. McDowell, 2 Nott & M'C. 251; Wollenleber v. Ketterlinus, 17 Penn. St. 389.

In Hill v. Norris, 2 Stew. & P. 114, Lipscomb, J., said: "I admit, that if

cases, is, had the holder a right to expect that his bill would be honored? And this is to be ascertained by regard to all the circumstances of the case. Where transactions have ceased, and the drawer knows that he has but a small balance to his credit, he would not be justified in expecting payment of a bill of a large amount; and if, under such circumstances, he were to draw a bill for a large amount, he would be chargeable without presentment, protest or notice.

§ 1080. Thus, where the drawee had a balance of 16*s.* 11*d.* in his hands in favor of the drawer, and the latter drew upon him for £246 3*s.* 7*d.*, without having any prospect of more funds in his hands than the balance mentioned, or right to expect that the bill would be honored, he was held bound without notice. And Chief Justice Marshall said:[1] "The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reasons to believe his bill will not be paid, the motives for requiring notice of its dishonor do not exist, and his case comes within the reason of the exception. Where all transactions between the parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us, that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be, were he debtor in the same sum." In another case where the draft was for $96, and only $38 balance was in the drawee's hands, no notice was held necessary.[2] And the doctrines here stated have the authority of Story[3] as well as Marshall. There is more difficulty in de-

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there were circumstances to satisfy the jury that the drawer committed a fraud in drawing on the drawee, and that he knew his bill would be dishonored, there would be much force in the argument that he ought not to be permitted to take shelter from the consequences of his fraud by intrenching behind a very small amount of assets that might be in the hands of the drawee. But I must again repeat, that I have not known a case, where there was any amount of funds in the hands of the drawee, that it has been ruled that the drawer was not entitled to notice."

[1] Hopkirk v. Page, 2 Brock. C. C. 20, 34.

[2] Blankenship v. Rogers, 10 Ind. 33; see also ——— v. Stanton, 1 Hayw. 271.

[3] Matter of Brown, 2 Story, 502, 520.

termining its application to the facts, than in discerning the true principle.

§ 1081. *If the drawer withdraws the funds* which he had in the drawee's hands when he drew the bill, or intercepts funds which he had provided to meet the bill;[1] or if he privately directs the drawer not to honor it;[2] or otherwise prevents the due acceptance or payment of his draft, he commits a fraud upon the holder of the bill, and forfeits his right to require demand and notice. But the withdrawal of funds will not operate as a forfeiture of the right to require demand and notice, if other arrangements be made between the drawer and drawee, by which the latter is justly expected to honor the bill.[3] So if the drawer fail to comply with conditions precedent to his right to draw, he cannot insist on demand and notice, for he himself is in fault.[4] And although there may be open accounts between the drawer and drawee, yet if they are in litigation, and the drawer knows it, he would not be justified in drawing, and could not be entitled to demand and notice.[5] If the drawer of a bill is discharged by laches, in failure to give him notice of dishonor, no subsequent appropriation of his funds in the drawee's hands to its payment is authorized, and the drawee so appropriating them will not be exonerated from liability to the drawer.[6]

§ 1082. *Effect of acceptance on the question.*—When the bill has been accepted, the acceptance is, *prima facie*, an admission of funds by the acceptor, and renders him absolutely liable to a third party. It is also to some extent evidence that the drawer had a right to expect that the acceptor

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[1] Dickens v. Beall, 10 Pet. 572; Rhett v. Poe, 2 How. 457; Valk v. Simmons, 4 Mason, 113; Conroy v. Warren, 3 Johns. Cas. 259; Murray v. Judah, 6 Cow. 484; Rucker v. Hiller, 3 Camp. 217; Chitty (13th Am. ed.) [*441], 496.

[2] Sutcliffe v. McDowell, 2 Nott & McC. 251; Mr. Chitty puts a query (Chitty, 484), and Story says: "Perhaps (Story on Bills, § 375) this is the rule. We think there can be no doubt about it."

[3] Orr v. McGinniss, 7 East, 359.

[4] Wollenleber v. Ketterlinus, 17 Penn. St. 389.

[5] Dollfus v. Frosch, 1 Denio, 367.

[6] Smith v. Rowland, 18 Ala. 367.

would pay the bill, even when it is shown that he had not been provided with funds;[1] and it seems to have been held conclusive in favor of the drawer's right to require presentment for payment and notice, although without funds.[2] But acceptance does not alter the general rule on the subject, and when it is shown that the drawer had no right to expect payment of the bill by the acceptor, the holder is excused for not making presentment,[3] or giving notice.[4] And proof that the acceptor was not in funds is *prima facie* evidence that there was no right to expect payment.[5] The fact that the acceptor has told the drawer before the maturity of the bill that he could not provide for it, and the drawer must, and that the acceptor has given the drawer money for that purpose, will not excuse want of due presentment and notice;[6] nor will the fact that the drawer, in apprehension of the dishonor of the bill, has lodged other money of the acceptor in the hands of the indorser, upon an undertaking by the indorser to return it if he should be exonerated from payment of the bill.[7]

§ 1083. *The rule as to indorsers.*—Ordinarily the indorser of a bill drawn without funds does not stand upon the same footing as the drawer, and although the drawer is not, he is, entitled to insist on strict demand and notice.[8] He is presumed to know nothing of the accounts or arrangements existing between the drawer and drawee; and if he has indorsed the bill for the accommodation of the drawer, or for another indorser, or a third person,[9] his liability is not fixed save by regular

[1] Orear v. McDonald, 9 Gill, 350; Hill v. Norris, 2 Stew. & P. 114; Campbell v. Pettengill, 7 Greenl. 126.

[2] Pons v. Kelly, 2 Hayw. 45; Richie v. McCoy, 13 Sm. & M. 541.

[3] Kinsley v. Robinson, 21 Pick. 327; Mobley v. Clark, 28 Barb. 390.

[4] Hoffman v. Smith, 1 Caines, 157; Allen v. King, 4 McLean. 128.

[5] See *post*, § 1084. [6] Baker v. Birch, 3 Camp. 107.

[7] Clegg v. Cotton, 3 Bos. & Pull. 239; Story on Bills, § 376.

[8] Wilkes v. Jacks, Peake, 202; Ramdulloday v. Darieux, 4 Wash. C. C. 61; Ralston v. Bullitts, 3 Bibb, 261; Scarborough v. Harris, 1 Bay, 177; Byles on Bills [*288], 443.

[9] Warder v. Tucker, 7 Mass. 449; Rea v. Dorrance, 18 Me. 137 (presentment too late); Carter v. Flower, 16 M. & W. 743; Brown v. Maffy, 15 East, 216.

demand and notice. But there may be circumstances under which the indorser is no more entitled to insist upon diligence than the drawer. Thus where he indorses for accommodation of the drawer, knowing the character of the bill, and neither of them expects that it will be honored, he comes within the reason of the principle which excuses the holder from giving the drawer notice, and it is equally unnecessary to charge him.[1] And in any case where the indorser participates in the fraud the rule applies.

[1] French v. Bank of Columbia, 4 Cranch (S. C.), 141. In Farmers' Bank v. Vanmeter, 4 Rand. 553, Green, J., said: "The modern doctrine is perfectly well settled that the law implies an injury from a want of due notice; and this presumption is so strong that in order to repel it proof is required to show that it was impossible for the party to suffer any damage or inconvenience. Thus in the case of a drawer, if the bill be drawn without funds in the hands of the drawee, and the drawer had no reason to expect that the bill would be accepted, this is considered as a case in which it is shown that no possible prejudice can result to the drawer from want of notice, since he knew when he drew the bill that it would devolve upon him to take it up, as well without as with notice of its dishonor; and having no reason to expect the bill to be accepted, it cannot be supposed that he would make any arrangements for putting funds in the hands of the drawee to take it up. But if the drawer without funds in the hands of the drawee, has any just ground to believe that the bill will be accepted, he ought to have notice: for in that case, it is to be presumed that he will so arrange his funds as to place the means of paying the bill at maturity, in the hands of the drawee. Such arrangements, if unnecessary and fruitless, would be prejudicial to the party; and to enable him to avoid this mischief, immediate notice should be given.

"The case of an indorser is still stronger than that of a drawer; for he has in general a right to resort to the drawer for indemnity, and to enable him to assert this right with the greatest possible effect, he ought to have immediate notice. But even as to an indorser a case may occur in which it may be shown to be impossible for him to suffer any inconvenience from the want of notice. As in the case of a note indorsed by the payee for the accommodation of the drawer, who should place in the hands of the indorser sufficient funds to discharge it. The latter would not be entitled to notice of the non-payment, because he could not possibly suffer any damage by the failure to give him notice (Cornay v. De Costa, 1 Esp. Rep. 303), since the only purpose of a notice would be to inform him of the necessity of resorting to the drawer for indemnity, which, in this case, is unnecessary, as he already has that indemnity in his hands." But in England it was recently held that the reply of the plaintiff to the indorser who set up absence of notice, that neither at the time when the bill was drawn nor afterward, nor when it became due, and in presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any funds of defendant in his hands, and that the bill was drawn for the purpose of raising money for the defendant,

The indorser of a note for accommodation of the maker or other party, is in general entitled to require strict demand and notice.[1]

In Virginia it has been said: "With the exception of the cases in which it can be shown that they could not by possibility suffer an injury by the failure to give them notice, the drawer and indorser have in all cases a right to strict notice, unless they waive that right or forfeit it by their own fraud. I do not find this ground of fraud very distinctly laid down as a reason for dispensing with the necessity of notice. But there are many cases in which it appears to have been the sole ground of the judgment, and in which the principle is distinctly alluded to.[2] * * * Every drawer of a bill virtually represents to all dealing for it, that it is drawn upon sufficient funds. The holder deals upon the faith that he shall have the additional security of the drawer; and if he fails in this he is disappointed by the fraud of the drawer; and if the indorser, with a knowledge of the facts, indorsed for the purpose of promoting the object of the drawer, he would be a participator in the fraud. * * * These cases are referred to for the purpose of showing that an indorser who unites with the drawer to deceive the holder by representing a bill as one that will probably be accepted, with a knowledge that it will not, is guilty of a fraud, which deprives him of the right to insist on notice."

§ 1084. *The burden of proof as to want of funds.*—When the holder seeks to rely on this excuse for want of presentment or notice, the burden of proof rests upon him to show that there were no funds in the hands of the drawee to meet

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the drawer, the acceptor, and the prior indorser, jointly, and the defendant was in no way damnified,—was a bad reply, and that the indorser was discharged by want of notice. Foster v. Parker, 2 Law. R. C. P. Div. 18 (1876).

[1] French v. Bank of Columbia, 4 Cranch, 141; Bogy v. Keil, 1 Mo. 743; Croton v. Dalheim, 6 Greenl. 476; Jackson v. Richards, 3 Caines, 343; Carter v. Flower, 16 M. & W. 743; Sisson v. Tomlinson, Selw. N. P. 335; Brown v. Maffey, 15 East, 222.

[2] Farmers' Bank v. Vanmeter, 4 Rand. 553; Green, J., citing Sisson v. Tomlinson, Selwyn N. P. 324; Brown v. Maffey, 15 East, 216; Leach v. Hewitt, 4 Taunt. 731.

the bill;[1] and this he must do by affirmative proof, as it will be presumed that there were funds, although the bill were dishonored.[2] Having shown that there were no funds, a *prima facie* excuse is made out; and if there were such qualifying circumstances as would entitle the drawer to require strict presentment and notice—such as his being an accommodation drawer, or keeping an open account, and the like—he must show them, for they lie peculiarly within his own knowledge.[3]

SECTION II.

WHEN THE PARTY IS UNDER AN OBLIGATION TO PROVIDE FOR PAYMENT.

§ 1085. In the *second* place, when the bill has been accepted for the mere accommodation of the drawer, and he has undertaken to supply funds to meet it, a failure to present it to the acceptor will be excused as against the drawer, who could not suffer save from his own laches.[4] And if the bill be drawn payable at his own house, it will be presumed to be for his (the drawer's) accommodation.[5] And so, while the indorser of a bill drawn for the accommodation of the drawer or acceptor, and the indorser of a note made for the accommodation of the maker, is entitled to insist upon its due presentment at maturity, yet if the bill is drawn and accepted, or the note made for the accommodation of a particular indorser, that indorser is the real party who should make

[1] Baxter v. Graves, 2 A. K. Marsh. 152; Golladay v. Bank of Union, 2 Head, 57; Ford v. McClung, 5 West Va. (Hagans), 156.

[2] Ibid.

[3] Merchants' Bank v. Easley, 44 Mo. 288; Sullivan v. Deadman, 23 Ark. 14; Cook v. Martin, 5 Sm. & M. 379; Durrum v. Hendrick, 4 Tex. 495; Wood v. McMeans, 24 Tex. 481; Carter v. Flower, 16 M. & W. 743; Fitzgerald v. Williams, 6 Bing. N. C. 68; Kemble v. Mills, 1 Man. & G. 771; Edwards on Bills, 645; *ante*, § 1082.

[4] French v. Bank of Columbia, 4 Cranch (S. C.), 141; Barbaroux v. Waters, 3 Metc. (Ky.) 304; Holman v. Whiting, 19 Ala. 703; Torrey v. Foss, 40 Me. 74 (case of notice); Ross v. Bedell, 5 Duer, 462; Story on Bills, § 370; Sharp v. Bailey, 9 B. & C. 44; *ex parte* Heath, 2 Ves. & B. 240.

[5] Sharp v. Bailey, 9 B. & C. 44.

provision to pay the bill at maturity, and the failure to make a due presentment or give due notice will be excused as to him, though not as to the other indorsers, or to the drawer if it be a bill.[1] This rule rests upon the principle that the accommodated indorser can by no possibility (as a rule) suffer loss by reason of a failure to make due presentment; since if the bill or note were dishonored, there would be no party against whom he would have recourse upon paying it. Still, however, if there were circumstances in the transaction which subjected the party accommodated to loss by failure to make a due presentment, it would be open for him to show them, and to the extent of such loss he would be exonerated.[2] If the bill be drawn for the accommodation of the acceptor, both drawer and indorsers are entitled to notice, for they have a right to expect him to pay it.[3] Upon the same prin-

[1] Ibid.; Story on Notes, § 268; Edwards on Bills, 638; Keyes v. Winter, 5 Me. 400; French v. Bank of Columbia, 4 Cranch, 141; McVeigh v. Bank of Old Dominion, 26 Grat. 785.

[2] Story on Notes, § 269. But see McMean v. Little, 59 Tenn. 330, where one of two drawers was the acceptor for accommodation of the other, and it was held that the latter was discharged by failure in respect to demand and notice.

[3] French v. Bank of Columbia, 4 Cranch (S. C.) 141, Marshall, C. J., saying: "Where he (the drawer) draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand in consequence of the non-payment of the bill. But how can the same reasoning be said to apply *a fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor were funds of the drawee in his hands on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was not to pay the bill." * * * And then, after stating the principle set forth in this section, that where the money is received by the indorser he is not entitled to notice, he added: "But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor before the draft becomes payable, the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of non-payment could as little be dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it

ciple, a drawer, although drawing upon funds, is not entitled to require notice from an indorser who indorsed for his accommodation, to enable him to get his bill discounted, or add strength to its credit; for although as against other parties entitled to require strict diligence in respect to presentment and notice, as to such indorser the debt is his own.[1] But it does not seem that an agreement by an indorser of a note, made at the time of indorsement, to pay the note at maturity would bind him absolutely without presentment or notice; it would be understood to have been made with the implied reservation that if the maker paid he was not liable, and he would be discharged by failure to demand payment of him.[2] If the maker and the payee, who is also indorser, jointly borrows the money, a promise of the payee to pay it, dispenses with necessity of presentment and notice.[3]

§ 1086. *Sometimes the relations of the parties are such as to excuse demand and notice.*—Where one of several partners draws upon a firm of which he is a member, it has been held that he is not entitled to notice, both in the case of an accepted [4] and of an unaccepted bill.[5] The drawer will, however (where a bill is drawn on a firm of which he is a mem-

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from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use."

[1] *Ex parte* Heath, 2 Ves. & B. 240; Story on Bills, § 310.

[2] Davis v. Gowen, 19 Me. 447.

[3] Bank of Seaford v. Conneway, 4 Houston, 206.

[4] Rhett v. Poe, 2 How. 457; Story on Bills, § 392; 1 Parsons N. & B. 524. In Porthouse v. Parker, 1 Camp. 82 (1807), the bill was drawn by the agent of George, James and John Parker, who were partners, upon John Parker, and accepted by the latter's agent. Lord Ellenborough held, that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn; and, further, that the acceptor being likewise a drawer there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all. See also New York, &c. Co. v. Meyer, 51 Ala. 325.

[5] Fuller v. Hooper, 3 Gray, 334. In New York, &c. Co. v. Selma Savings Bank, 51 Ala. 305, a bill was drawn by one firm on another, and was accepted by the latter. The two firms had a common member. *Held*, notice not necessary to charge the drawers. Taylor v. Young, 3 Watts, 339; Gowan v. Jackson, 20 Johns. 176; Story on Bills, § 392.

ber), be entitled to notice if the copartnership had dissolved before the bill was drawn.[1] The question of notice of the dissolution of the firm, it is said, might be important.[2] In like manner, where the drawer and drawee are partners in the particular transaction in which the bill was drawn, no notice, it has been held, is necessary, for the reason assigned that knowledge of one partner is the knowledge of the other, and notice to one partner is notice to the other.[3] But it has been held that notice must be given to the indorser, when one member of a firm makes a note and another indorses it, both parties signing in their own name, although the note was given for partnership purposes, and was to be paid out of the partnership funds.[4] Where one firm draws on another, and they have a common member,[5] or a firm draws on a member,[6] the drawer firm is not entitled to notice.

§ 1087. Where the makers of a note constitute one firm, and it is indorsed by another firm, in each of which firms the same person is one of the partners, the indorsing firm is entitled to require strict presentment to the firm making the note, for the two firms stand in their business relations as distinct persons, with separate accounts, funds and liabilities, although having a common member.[7] And, as has been said, to hold otherwise would subject the firm indorsing to payment of the note, because one of the partners belonged to both firms, when the firm primarily liable is solvent, and would pay at once if the note were presented.[8] The same rule applies when the drawer or indorser of a bill belongs to two firms.[9] For though each partner is presumed to have knowl-

[1] Taylor v. Young, 3 Watts, 339. [2] 1 Parsons N. & B. 525.

[3] Harwood v. Jarvis, 5 Sneed, 375; Story on Bills (Bennett's ed.), § 313 *a*; Rhett v. Poe, 2 Howard, 457.

[4] Foland v. Boyd, 23 Penn. St. 476, Lowrie, J.

[5] New York, &c. Co. v. Selma Savings Bank, 51 Ala. 305; see Porthouse v. Parker, 1 Camp. 82, *supra*.

[6] New York, &c. Co. v. Meyer, 51 Ala. 325.

[7] Dwight v. Scovil, 2 Conn. 654; Caunt v. Thompson, 7 Man. G. & S. 400; Foland v. Boyd, 23 Penn. St. 476; 1 Parsons N. & B. 523; Story on Notes, § 294.

[8] Swift, C. J., in Dwight v. Scovil, *supra*. [9] Story on Bills, § 376.

edge of all the facts known to another, yet knowledge of non-presentment is no equivalent to it, nor is it a waiver of the holder's obligation to make it. Where the two firms reside in different and distant places, the necessity and reason of the rule is peculiarly obvious.[1]

§ 1088. It is intimated by Professor Parsons that notice to the drawing or indorsing firm would be likewise necessary.[2] But this does not seem to be a necessary implication from the foregoing. A formal demand upon the firm primarily liable is necessary in order to ascertain whether or not it will pay the bill or note; and until such demand is made at its place of business, or otherwise, according to law, the drawing or indorsing firm has not broken its contract that upon such demand the bill or note will be paid. But if it is not paid on demand, it might be urged that the firm drawing or indorsing must be chargeable with the default, as it should know of the dishonor through its common copartner, who was as much bound to see the bill or note paid as his associate in the other firm. This view has been taken, or at least very distinctly intimated, in a case where a question nearly identical was presented.[3]

§ 1089. When there are joint makers of a note, and they live so far apart that it is impossible to make demand of both on the same day, it would seem that a delay for the necessary time to present to both would excuse for such time the want of demand on both, and the want of notice.[4]

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[1] Dwight v. Scovil, *supra*.

[2] 1 Parsons N. & B. 523.

[3] West Bank Branch v. Fulmer, 3 Penn. St. 399. The note in this case was made by one firm and indorsed by another. All the indorsers were partners in the firm which made the note, which firm had two additional members. No notice was given to Cochran & Perry, the indorsing firm, but they were held liable, and Gibson, C. J., said: "It would be absurd in an indorser to complain that he had not been served with formal notice of what was known to him, or that he was prejudiced for want of it. As, then, it was as much the business of Cochran, Perry & Co. as it was the business of the other members of Beers, Cochran & Co. (the makers), to provide for the payment of their joint note at its maturity, and as they all knew that provision had not been made for it, proof of notice to Cochran & Perry would have been superfluous in an action against them as indorsers."

[4] 1 Parsons N. & B. 531. See Chapter XX, on Presentment for Payment, § 595, vol. 1.

CHAPTER XXXII.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST AND NOTICE, ARISING FROM SPECIAL ACTS OF WAIVER.

SECTION I.

SPECIAL WRITTEN AND VERBAL WAIVERS OF PRESENTMENT, PROTEST AND NOTICE—GENERAL PRINCIPLES RESPECTING NOTICE.

§ 1090. When presentment of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be a fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and as prompt presentment is a requirement solely for the benefit of the drawer and indorsers, they are themselves the sole judges to determine whether or not they will enforce it. The waiver may be either verbally or in writing; it may be expressed *in totidem verbis*, or inferred from the words or acts of the party; and it matters not what particular language may be used, so that it conveys the idea that the presentment at maturity is dispensed with. The like observations apply to the protest and notice. Where the indorser of a check wrote over his name "waiving demand and notice," it was held that he was not entitled to require any demand of the maker, or notice to himself of nonpayment, as conditions precedent to his liability.[1] Such words have the effect to dispense with the necessity for those formalities.

§ 1091. It is not necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a

[1] Emery v. Hobsen, 62 Me. 578. See also Woodman v. Thurston, 8 Cush. 157; 16 American Rep. 514.

character to satisfy the mind that a waiver is intended;[1] but there is authority to the effect that such waivers as we are now treating of should receive a strict construction.[2] And it has been said that to show a waiver of demand and notice there must be clear and unequivocal evidence,[3] and that equivocal circumstances or agreements will not suffice.[4]

Mr. Chitty intimates that an indorser's waiver must be express, while he admits that the drawer's may be implied.[5] But no distinction in this regard is recognized.[6]

§ 1092. *Sometimes the waiver is embodied in the instrument itself*, and in such cases the waiver enters into the contract of every party who signs it, whether as drawer, maker, acceptor or indorser. Thus, where the words "presentation and protest waived," or "notices and protests of non-acceptance and non-payment waived," are written in the bill, they are binding, not only upon the drawer, but also upon the indorsers, who become parties to the waiver in becoming parties to the bill.[7] Clearly this is the case where such a waiver expressly includes the drawer and indorsers.[8] Sometimes the waiver is not embodied in the paper itself, but is made by one of the indorsers by writing over his signature "I waive demand," or "I waive presentment," and in such cases it is simply the individual waiver of such party, and not binding upon others who do not make themselves parties to it.[9]

The waiver may also be upon a separate paper, written prior to,[10] contemporaneously with,[11] or subsequent to the indorsement.[12]

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[1] Fuller v. McDonald, 8 Greenl. 213; 1 Parsons N. & B. 594.

[2] Bird v. Le Blanc, 6 La. Ann. 470; Wall v. Bry, 1 La. Ann. 312.

[3] Gregory v. Allen, Mart. & Y. 74. [4] Story on Bills, § 371.

[5] Chitty on Bills (13th Am. ed.) [*506], 573, on authority of dictum of Sir James Mansfield, in Borradaile v. Lowe, 4 Taunt. 93.

[6] Thornton v. Wynn, 12 Wheat. 183; Story on Bills, § 321.

[7] Bryant v. Merchants' Bank, 8 Bush (Ky.), 43; Smith v. Lockridge, 8 Bush (Ky.), 423; Lowry v. Steele, 27 Ind. 170.

[8] Bryant v. Lord, 19 Minn. 397. [9] Woodman v. Thurston, 8 Cush. 157.

[10] Duvall v. Farmers' Bank, 7 Gill & J. 44. [11] *Post*, § 1093.

[12] Spencer v. Harvey, 17 Wend. 489.

§ 1093. *Verbal waivers.*—It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay it if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. Such evidence is not offered for the purpose of varying the written contract of indorsement, which is simply to pay the note after exercise of due diligence against the maker, but to show that the parties have between themselves settled the amount of diligence to be required.[1] It has been held differently,[2] but the doctrine of the text seems to us more consistent with the principles upon which waivers are sustained.

§ 1094. *Extent of waiver.*—The terms of the waiver are often broad enough to include all the steps usually necessary to fix the liability of the indorser. Thus where the words, "I waive demand and notice,"[3] are written over the indorser's signature, or "presentation and protest waived,"[4] are embodied in the instrument, they import an express waiver of demand, protest and notice. So, "waiving demand and notice,"[5] or "I waive protest and notice,"[6] or "I waive demand of protest,"[7] though somewhat variant in expression, have the same significance—a waiver of all steps usually taken to bind the indorser.

Sometimes notice alone is waived, as, for instance, where the drawer refused to give his address, saying that the ac-

[1] Boyd v. Cleveland, 4 Pick. 525; Barclay v. Weaver, 19 Penn. St. 396; Hazard v. White, 26 Ark. 174; Lane v. Steward, 20 Me. 98; Fuller v. McDonald, 8 Greenl. 213; see also Wall v. Bry, 1 La. Ann. 312; see Story on Bills, § 317, note 1.

[2] Hightower v. Ivy, 2 Port. (Ala.) 308; Barry v. Morse, 3 N. H. 132; Kern v. Van Phul, 7 Minn. 74; Davis v. Gowen, 19 Me. 447, held demand not waived, as the promise could not be construed to discharge that obligation.

[3] Woodman v. Thurston, 8 Cush. 157; Jaccard v. Anderson, 37 Mo. 91.

[4] Bryant v. Merchants' Bank, 8 Bush (Ky.), 43.

[5] Johnston v. Searcy, 4 Yerg. 182.

[6] Gordon v. Montgomery, 19 Ind. 110.

[7] Porter v. Kemball, 53 Barb. 497.

ceptor would not pay, and that he would call in a few days, and inquire whether the bill had been paid or not.[1]

§ 1095. The words, "I waive protest," or "waiving protest," or any similar phrase, importing that the protest is waived, are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice, the protest being according to the law merchant the formal and necessary evidence of the dishonor of such an instrument. In waiving "protest," the party is considered not only as dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal though necessary proof which the law requires.[2]

But when a waiver of protest is applied to an inland bill, or to a promissory note, it has not in all cases been considered clear that it was intended to dispense with notice; the protest of such instruments not being necessary in order to charge the drawer or indorsers. But the word "protest" has, by general usage, acquired a more extensive signification than the mere formal declaration of a notary. Inland bills and promissory notes may be protested by statutory enactment in many States, and the protest is accorded the same effect as to them when it is made, though it is not necessary to make it. And the weight as well as the number of authorities predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill.[3] And such seems to us clearly the correct conclusion. In the Supreme Court of the United States a waiver of protest of an inland bill was considered under the circumstances ambiguous as to

[1] Phipson v. Kneller, 1 Stark. 116; 4 Camp. 285; Edwards on Bills, 633.

[2] Union Bank v. Hyde, 6 Wheat. 572; Edwards on Bills, 634.

[3] Coddington v. Davis, 1 Comst. 186; 3 Denio, 16. In this case the waiver was as follows: "Please not protest T. B. Coddington's note due, and I will waive the necessity of the protest thereof." Porter v. Kemball, 53 Barb. 646; Fisher v. Price, 37 Ala. 407; Jaccard v. Anderson, 37 Mo. 91; Carpenter v. Reynolds, 42 Miss. 807, note; Hood v. Hallenbeck, 14 N. Y. S. C. (7 Hun), 364, note.

the intent of the party, and parol evidence was admitted to show that it had the full signification of a waiver of demand and notice; but the reasoning of the opinion seems to us to bear out the doctrine of the text that, *ex vi termini*, it imports, according to the understanding of mercantile men, that all the steps to be ordinarily taken are dispensed with.[1] The contrary view obtained in Louisiana.[2] In Maine, by statute, waiver of demand and notice must be in writing.[3]

§ 1096. *Construction.*—A waiver is not to be construed to extend beyond the fair and reasonable import of its terms. Therefore a waiver of notice, which is a separate and distinct step from the presentment, is not regarded as waiving the presentment or demand upon the drawee or maker.[4] The drawer or indorser may have had confidence that the drawee, acceptor or maker would honor the bill or note upon its pre-

[1] Union Bank v. Hyde, 6 Wheat. 572. The following undertaking of the indorser of a promissory note: "I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested," was held by the United States Supreme Court to be ambiguous as to whether it amounted to a waiver of demand and notice, and parol proof was admitted to show that it was the understanding of the parties that the demand and notice necessary by law to charge the indorser should be dispensed with. And it was said by Johnson, J.: "Had the defendant omitted one word from his undertaking, it would have been difficult to maintain the affirmative of this proposition. But what are we to understand him to intend when he says, 'I will consider myself bound in the same manner as if said notes had been, or should be, legally protested?' Except as to foreign bills, a protest has no legal binding effect, and as to them it is evidence of demand, and incident to legal notice. It either, then, had this meaning, or it had none. This reasoning, it may be said, goes no further than to a waiver of the demand; but what effect is to be given to the word 'bound?' It must be to pay the debt, or it means nothing." It was held by the court that, if this reasoning were inconclusive, the evidence admitted proved that it was the real intention of the parties to give this effect to the agreement.

[2] Ball v. Greaud, 14 La. Ann. 305; Bird v. Le Blanc, 6 La. Ann. 470; Wall v. Bry, 1 La. Ann. 312.

[3] Thomas v. Mayo, 57 Me. 40.

[4] Voorhees v. Atlee, 29 Iowa, 49; Scull v. Mason, 7 Wright, 99; Buchanan v. Marshall, 22 Vt. 561; Lane v. Steward, 20 Me. 98; Drinkwater v. Tebbetts, 17 Me. 16; Berkshire Bank v. Jones, 6 Mass. 524; Backus v. Shipherd, 11 Wend. 629; Story on Bills, §§ 371, 375; Story on Notes, § 272; *contra*, Matthey v. Gally, 4 Cal. 62.

sentment; or the holder may have insisted on not incurring the risk of diligence required in giving prompt notice. Whatever motive may have actuated the waiver of notice, it does not expressly or inferentially extend to a waiver of the demand, and that must be duly made in order to charge the drawer or indorser. The words "I hold myself accountable, and waive all notice," do not imply an extension of the waiver to the demand; but merely an accountability without notice, leaving the demand still as a condition precedent.[1]

§ 1097. The fact that the waiver of protest, demand or notice states the reasons or grounds of such waiver does not affect it, and where the waiver ran: "Notice, demand, protest and due diligence waived on account of the war and insurrection," during the late civil war in the United States it was held absolute upon its face, and that the liability of the indorsers were absolutely fixed by dishonor.[2]

§ 1098. Where there is a written waiver of demand upon the face of the bill or note, but not of notice, it may be shown by parol testimony that there was also a verbal waiver of notice, and so where there is a written waiver of notice a verbal waiver of demand may be proved. If a waiver of both the conditions (of demand and notice) may be proved by parol, we are aware of no good reason why that kind of proof should be excluded to show a waiver of one condition where a waiver of the other is made a part of the indorsement itself.[3]

§ 1099. Any language which implies a guaranty renders the party using it a guarantor, and consequently such party is not entitled to demand and notice as such guarantor. But it has been held that the words "surety" or "security,"[4] or "backer"[5] placed after an indorser's name is no waiver of demand and notice, on the ground that they were intended to

[1] Burnham v. Webster, 17 Me. 50. [2] Neal v. Wood, 23 Ind. 524 (1864).

[3] Drinkwater v. Tebbetts, 16 Me. 17; Mills v. Beard, 19 Cal. 161; Edwards on Bills, 635. See *ante*, § 1093, and note 1, p. 131.

[4] Bradford v. Corey, 5 Barb. 461, Paige, J.

[5] Seabury v. Hungerford, 2 Hill, 80.

secure to the parties the privileges of sureties as well as of indorsers. The authority of these cases, however, is doubted.[1]

The expressions "accountable," "eventually accountable,"[2] and "hold ourselves responsible for payment,"[3] imply a waiver of demand and notice, and so does the word "holden."[4] And where an indorser wrote, "I assign the within note to J. T., and hold myself responsible for the payment of the same, the maker to have two years to pay the same, unless he prefers to pay sooner—interest on the same to be paid annually," it was held a waiver of demand and notice.[5]

§ 1100. Whether particular conversations amount to a waiver or not has been held by the United States Supreme Court to be a question of fact for the jury, and not one of law for the court.[6] But whether or not distinct words used amount to a waiver or not, would be, we should think, a question of law; although, if intermixed with others about which the testimony is not clear and concurrent, it would be a question of fact for the jury to determine whether or not there was a waiver. In Massachusetts, it has been said by Shaw, C. J.: "Though questions of due diligence and waiver were originally questions of fact, yet having been reduced to a good degree of certainty by mercantile usage, and a long course of judicial decision, they assume the character of questions of law; and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community may be certain, practical and uniform, as well as reasonable, equitable and intelligible.[7]

§ 1101. Laches of a holder by delay may be waived, but

[1] 1 Parsons N. & B. 579.

[2] Turber v. Caverly, 42 N. H. 74; McDonald v. Bailey, 14 Me. 101; Burnham v. Webster, 17 Id. 50.

[3] Blanc v. Mutual National Bank, 28 La. 922; see Small v. Clarke, 51 Cal. 227.

[4] Bean v. Arnold, 16 Me. 251; Blanchard v. Wood, 26 Id. 358.

[5] Airey v. Pearson, 37 Mo. 424.

[6] Union Bank v. Magruder, 7 Pet. 287. See Carmichael v. Bank of Pennsylvania, 4 How. (Miss.) 567.

[7] Creamer v. Perry, 17 Pick. 332.

the waiver should be distinctly proved. Where a draft was drawn in Ohio on New York, on July 10th, 1857, and before presentment was lost; and on August 10th the drawer gave the holder another precisely similar, post-dated July 10th, 1857, and wrote across it "duplicate," and the latter presented it on August 14th, and was refused payment, the drawees having failed the day before—it was held that the second draft was given as a substitute for the first, and to take its place, and that the plaintiff's delay was fatal.[1]

SECTION II.

SPECIAL WAIVERS AFTER THE EXECUTION OF THE BILL OR NOTE.

§ 1102. The waiver may not only be written upon the bill or note by the party at the time he signs it, but as well at any time before maturity; and when made after the execution of the instrument no new consideration is necessary to support it.[2] All that the holder contracts to do in order to bind the indorser is to use due diligence in making presentment and demand of payment of the acceptor or maker, and in giving the indorser notice in the event of his default. Due diligence, in the absence of any agreement or understanding between the parties, fixes the time within which such presentment must be made and notice given; but when the indorser himself relaxes the rule, due diligence requires no more than that his own terms be complied with.

§ 1103. *As to waiver before maturity by conduct, act or agreement.*—Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to

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[1] Benton v. Martin, 40 N. Y. 345.

[2] Wall v. Bry, 1 La. Ann. 312. Slidell, J., saying: "The indorsement of the defendant was made some months anterior to the indorsement and signature of the waivers. * * * The defendant urges that it was not binding, because made without consideration. The plea that the waiver was without consideration cannot avail the defendant. It was made before the maturity of the note; the holder may have regulated his conduct, in not protesting the note, by the defendant's waiver, confiding in it; and to relieve him from it now would be sanctioning a breach of good faith, and permitting that party to gain by his own disingenuousness." Story on Notes, § 271.

make demand or protest or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of taking these steps. Where the party told the holder eighteen months before maturity not to protest it, as it should be paid at maturity, it was held a waiver of demand and notice.[1] So where the indorser informed the holder that the maker had absconded, and requested forbearance.[2] So where, on the first day of grace, the indorser requests time, and says that an arrangement will be made, notice is waived;[3] so where the drawer,[4] or the indorser,[5] informs the holder that the bill will not be paid, or that he cannot pay it when due, it is a waiver of demand, protest and notice. So where the drawer of a bill tells the holder to hold it without presentment an indefinite time, he takes the risk of the drawee's solvency; and if he fails in the meantime the want of presentment is excused.[6]

§ 1104. Where the indorser, before the note fell due, wrote to the holder stating that the maker had failed, acknowledging his liability, and asking indulgence until funds could be realized, it was held a waiver of demand and notice.[7] So where the indorser, before the note fell due, was informed that the maker wished it to remain another year, and replied that he was willing.[8] So where the indorser, being informed that the maker had failed, told the holder that there would be no trouble about it, and that he would pay it.[9] So where the indorser, before maturity, says that he will pay it, or uses any equivalent expression.[10] So where the indorser tells the holder to give himself no uneasiness, that the note will be paid at maturity, that he is collecting money for the maker, and will see it paid.[11] So an agreement by the

[1] Sigerson v. Mathews, 20 How. 496.

[2] Leffingwell v. White, 1 Johns. Cas. 99.

[3] Gove v. Vining, 7 Metc. 212.

[4] Minturn v. Fisher, 7 Cal. 573.

[5] Hunter v. Hook, 64 Barb. 468.

[6] Sheldon v. Chapman, 31 N. Y. 644.

[7] Spencer v. Harvey, 17 Wend. 489.

[8] Sheldon v. Horton, 53 Barb. 23.

[9] Whitney v. Abbot, 5 N. H. 378.

[10] Lary v. Young, 8 Eng. (Ark.) 401; Bruce v. Lytle, 13 Barb. 163; Marshall v. Mitchell, 35 Me. 221; Leonard v. Gary, 10 Wend. 504; Edwards on Bills, 633.

[11] Bryan v. Wilcox, 49 Cal. 47.

indorser to pay, if the note cannot be collected of the maker by due course of law, binds him without demand or notice.[1] So where the indorser after maturity agreed with the maker to take up the note, to give back to him the property for which the note was given, and to return the note without further consideration, it was held that he was liable without demand or notice.[2]

§ 1105. So where the party puts any obstacle in the way of, or prevents demand and notice, or makes an arrangement which will render demand unavailing, it operates as a waiver of demand and notice; as where the indorser obtained possession of the note before maturity and withheld it until after that time.[3] So where the drawer of a check[4] or bill[5] stops its payment; where the indorser had agreed with the maker for value to extend the time for a year, and had transferred the note to the holder without informing him of it;[6] and where the indorser failed to apply funds deposited with him by the drawer to meet the bill.[7]

§ 1106. Where the indorser agrees to an extension of time of payment, it waives demand, protest and notice;[8] so an agreement to attend and take care of the note;[9] or an agreement for a renewal.[10] But a mere request for a renewal has been held no waiver of notice.[11] And where notes indorsed for accommodation are not protested, and no notice is given, the signing of new notes for accommodation, which are given in renewal, is no waiver of notice.[12]

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[1] Backers v. Shepherd, 11 Wend. 629. [2] Andrews v. Boyd, 3 Metc. 434.

[3] Havens v. Talbott, 11 Ind. 323.

[4] Purchase v. Mattison, 6 Duer, 587; Jacks v. Darrin, 3 E. D. Smith, 557.

[5] Lilley v. Miller, 2 Nott & McCord, 257. But it has been held to apply only to notice. Hill v. Heap, Dow. & R. N. P. 57.

[6] Williams v. Brobst, 10 Watts, 111. [7] Curtis v. Martin, 20 Ill. 557.

[8] Ridgeway v. Day, 13 Penn. St. 208; Barclay v. Weaver, 19 Penn. St. 396; Farmers' Bank v. Wakles, 4 Harr. (Del.) 429; Amoskeag Bank v. Moore, 37 N. H. 539.

[9] Taunton Bank v. Richardson, 5 Pick. 436.

[10] First National Bank v. Ryerson, 23 Iowa, 508.

[11] Sussex Bank v. Baldwin, 2 Harr. 487; Cayuga County Bank v. Dill, 5 Hill, 401.

[12] Oswego Bank v. Knower. Hill & D. 122.

Where the drawer of a dishonored bill gave the holder his own note for the amount, proof of notice was held to be dispensed with, and laches unavailable as a defense.[1] This seems to us clearly right, but the giving of a bond has been held to be only *prima facie* evidence of a waiver.[2] The fact that an indorser appeared at a meeting of creditors, and assumed the character of a creditor for a large sum, including the note sued on, has been held no waiver of demand and notice;[3] but it has been well observed that it might be regarded as evidence of such waiver.[4]

A declaration by the drawer of a check, who is paying teller of the bank on which it is drawn, three days before maturity, that it would not be paid;[5] and a declaration by the indorser of a check that the maker could not pay it, and had made an assignment preferring him,[6] have been considered as waivers of demand and notice.

Inquiries and attempts by an indorser to get the maker to pay have been held no waiver,[7] but the contrary has been held where the indorser himself undertook to present a bill after maturity.[8]

§ 1107. *As to waivers on the day of maturity.*—The waiver may be made on the day of maturity as well as at any other time; and where on that day the indorser requests the holder not to protest the note, it has been held a waiver of demand.[9] So where, in response to inquiry by the holder, the indorser tells him that it will be of no use to call upon the maker, demand and notice are waived.[10] And where the indorser of two bills, falling due the 4th and 5th of April respectively, called on the holder on the 4th, and told him that the bills would not be paid, but it was not worth while

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[1] Leonard v. Hastings, 9 Cal. 236.

[2] Ralston v. Bullitts, 3 Bibb, 261; Mills v. Rense, 2 Litt. 203.

[3] Miranda v. City Bank, 6 La. 740.

[4] 1 Parsons N. & B. 591.

[5] Minturn v. Fisher, 7 Cal. 573.

[6] Taylor v. French, 4 E. D. Smith, 458.

[7] Cram v. Sherburne, 14 Me. 48.

[8] Hussey v. Freeman, 10 Mass. 84.

[9] Scott v. Greer, 10 Penn. St. 103. But see Prideaux v. Collier, 2 Stark. 57. This latter case has not escaped the criticism of Professor Parsons (see 1 N. & B. 592, note *g*).

[10] Barker v. Barker, 6 Pick. 80.

to trouble him with a two-penny post letter to give notice, as it was not worth the money, and he would bring the plaintiff some money next week in part payment of the bills, it was thought that it would have dispensed with notice, but would not support an allegation of due notice.[1] In New York an accepted offer by the indorser to the holder to renew the note on terms which the former proposed, was held no waiver of notice;[2] but the court was divided, and the decision has been justly criticised and condemned.[3] In a subsequent case in that State, where, upon the maturity of a valid note, a renewal was given under an usurious agreement, an indorser of both notes was held not discharged from liability on the first because of failure to give notice of presentment, and non-payment of the second.[4]

§ 1108. And when the indorsers, on the last day of grace, wrote to the holder in Boston, where the note was payable at a bank, from St. Louis, where the indorsers resided, knowing that the maker had failed to provide for payment, expressing annoyance at the fact, and saying: "We hold ourselves responsible for the payment of this note, and shall see that it is done at an early day," the United States Supreme Court held that they were liable, although no demand of payment was made and no notice was given; and although, from the relative location of the indorsers and the holder, the latter could not receive the letter for several days. Of course this waiver was not after maturity, with knowledge of the holder's laches, as the indorsers, at whatever hour they wrote the letter, had no knowledge that there had been a failure to present and send notice of dishonor. But their promise to pay with knowledge of the maker's laches in not providing for its payment, was considered sufficient.[5] Clearly, the mere presence of an indorser at the time of presentment and refusal of payment is no waiver of notice.[6] Where on the day of

[1] Burgh v. Legge, 5 M. & W. 418.

[2] Cayuga Co. Bank v. Dill, 5 Hill, 404.

[3] 1 Parsons N. & B. 593.

[4] Leary v. Miller, 61 N. Y. 489.

[5] Yeager v. Farwell, 13 Wall. 12, Davis, J.

[6] Grant v. Spencer, 1 Montana, 136.

maturity the indorsers wrote on the note: "We hereby waive protest on this note, and hold ourselves responsible for the payment of the same, which is hereby extended thirty days," it was held that neither protest nor notice at the end of thirty days was requisite.[1]

SECTION III.

BY WHOM AND TO WHOM WAIVER OF DEMAND, PROTEST AND NOTICE MUST BE MADE.

§ 1109. The words or acts constituting a waiver must, of course, be those of the person entitled to require that the regular steps of demand, protest, and notice shall be taken; for it would be a solecism to permit one person to waive away the rights of another.[2]

Therefore, if one indorser write a waiver over his name, it does not affect another;[3] and the acts and declarations of the maker[4] or acceptor[5] cannot affect the drawer or indorsers, as the case may be, unless they adopt them as theirs also.

One partner may waive demand, protest and notice for the firm; but if the firm were already discharged, the promise by one partner to pay, made after dissolution, would bind him only.[6] And it has been held that if a firm indorse a note for accommodation, one partner cannot bind the others by any promise he might make for payment, since as to that they are not partners.[7]

The acknowledgment by the party's agent, attorney or clerk, having the management of his case, is the same as his own.[8]

§ 1110. The promise to pay, in order to constitute a

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[1] Blanc v. Mutual Bank, 28 La. Ann. 921.

[2] May v. Boisseau, 8 Leigh, 164, Tucker, P.

[3] Central Bank v. Davis, 19 Pick. 373.

[4] Lee Bank v. Spencer, 6 Metc. 308; Pierce v. Whitney, 29 Me. 188.

[5] *Ex parte* Bignold, 2 Mont. & A. 633.

[6] Hart v. Long, 1 Rob. (La.) 83.

[7] Baer v. Leppert, 19 N. Y. S. C. (12 Hun), 516.

[8] Standage v. Creighton, 5 Car. & P. 406.

waiver, should be made to the party entitled to demand payment, and if made to an entire stranger, it is not evidence of a waiver of laches;[1] but it might be evidence that due presentment was made and notice given.[2] But when the promise is made to the holder, it inures to the benefit of all who acquire the bill or note through him;[3] and so will any agreement or understanding or arrangement between an indorser and the maker inure to the benefit of an indorsee in a suit against the indorser.[4]

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[1] Miller v. Hackley, 5 Johns. 375; Olendorf v. Swartz, 5 Cal. 580. But in Byles on Bills [*292], it is said the promise may be made to a stranger.

[2] Potter v. Rayworth, 13 East, 417, Lord Ellenborough saying: "Whether the promise to pay was made to the plaintiff, or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of its dishonor."

[3] Kennon v. McRea, 7 Port. (Ala.) 175; Rogers v. Hackett, 1 Fost. 100; Potter v. Rayworth, 13 East, 417; Gunson v. Metz, 1 B. & C. 193; 2 Dow. & R. 334.

[4] Williams v. Brobst, 10 Watts, 111; Marshall v. Mitchell, 35 Me. 221; Curtiss v. Martin, 20 Ill. 557; 1 Parsons N. & B. 611.

CHAPTER XXXIII.

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN INABILITY ON THE PART OF THE HOLDER TO MAKE DUE DEMAND, PRESENTMENT OR PROTEST, OR GIVE DUE NOTICE.

SECTION I.

WHEN THERE IS NO PERSON IN EXISTENCE UPON WHOM DEMAND CAN BE MADE, OR WHO IS LEGALLY BOUND.

§ 1111. In the *first* place, where there is no person in existence upon whom demand can be made, or none who is legally liable, the presentment is excused, for the reason that it is either an impossibility, or that it would be a fraud upon the holder to require it. And firstly, when there is no person in existence upon whom demand can be made. Thus where the maker has died before maturity, and there is no personal representative of whom payment could be demanded, it cannot of course be made; but it would be otherwise if a personal representative had been appointed.[1] Where the maker and his whole family had been drowned two days before the maturity of the note, and there was no will, and no letters of administration taken out, the want of demand was excused.[2] And so in all cases, where there is an actual party bound as promisor, but no one then existing, who represents him, the delay in making demand is excused. But it is no excuse for want of notice to the drawer or indorser.[3]

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[1] Chitty on Bills (13th Am. ed.) [*436-7]; 1 Pars. N. & B. 444, 445.

[2] Haslett v. Kunhardt, Rice, 189.

[3] Price v. Young, 1 McCord, 339. This was a suit against an indorser of a note, the maker of which had died before maturity. The excuse alleged for want of demand was that there was no legal representative on whom it could be made. The Court said: "Where a demand cannot be made, the law does not

§ 1112. But where there is no principal party then or at any time existing, who is legally bound upon the bill or note, it would seem that both presentment and notice are excused.

Thus when an agent signed his principal's name after his death, there could be no demand, and therefore the indorser would be bound without it.[1]

§ 1113. So where the note is void as between the maker and payee, on account of an illegal consideration, the indorser may be held without any proof of demand and notice.[2] The payee, when he indorses the note, warrants by the very act of indorsement, that the maker is legally liable to pay it, knowing, as he necessarily must, that such is not the case. The holder, in the belief of its truth, might look only to the maker, and fail to take the usual steps to charge the indorser; and if, when he became aware that the maker was not legally bound, he could not recover against the indorser, the latter would be protected by his own fraud, and the holder suffer by the confidence placed in him. Thus, in Massachusetts,[3] where a note was void for usury between maker and payee, and the holder failed in suit against the maker on that account, it was held that he could hold the indorser without any proof of demand or notice. Sewall, J., compared it to the case of a bill drawn without funds, the indorser of the note standing in the relation of drawer, and

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dispense with notice. The circumstances which prevented it, and the notice are still required. It was the duty of the holder in this case, admitting that a demand could not have been made, to have given the defendant notice in as short a period, after having ascertained that the demand could not be made, as she could have been required to do, if a demand had been made. Suppose the demand had been made on the 26th of October, and no notice to the defendant had been given until the 10th or 15th of November, could this have been considered a reasonable time when the parties were so contiguous to each other as to have enabled the plaintiff to have given the notice in five hours, or at most in one day? I presume not. The law is express, that the notice shall be given as soon as shall be conveniently practicable."

[1] Burrill v. Smith, 7 Pick. 291.

[2] Bayley on Bills, ch. VII, sec. 2, p. 205; 1 Parsons N. & B. 444, 445.

[3] Copp v. M'Dugall, 9 Mass. 1; see also Chandler v. Mason, 2 Vt. 193.

the maker or acceptor, and said: "When the promise or acceptance is void, as it is in case of usury between the drawer and acceptor, if he will resort to that defense, against his promisee, the contract becomes, as it respects the indorser, a draft accepted without funds—that is, in the case of a promissory note." The like doctrine has obtained in New York, where it is held that the indorser of a forged check is liable without demand or notice;[1] and in England, where it is held that the indorser of a bill drawn on an improper demand is not entitled to notice;[2] and it would extend to any case in which there was no legal principal bound, as where the maker or acceptor was an infant, married woman, or lunatic,[3] or was a fictitious person, the indorser knowing it.[4] An accommodation indorser of a fictitious bill purporting to be drawn by an agent on his principal, it has been held is entitled to notice if he possessed no knowledge of the fraud.[5] But every indorser warrants the instrument to be valid, and exactly what it seems to be; and whether he knows the contrary or not, it seems to us that he is absolutely bound, if his warranty fails, without demand or notice.[6]

SECTION II.

THE IMPRACTICABILITY OF FINDING THE PARTY TO WHOM PRESENTMENT SHOULD BE MADE, OR NOTICE GIVEN, OR ASCERTAINING HIS RESIDENCE OR PLACE OF BUSINESS.

§ 1114. In the *second* place the want of due presentment, or due notice, will be excused when the holder, after exercising due diligence, cannot find the party to whom presentment should be made or notice given, or ascertain his place of residence or business. When this excuse is relied upon,

[1] Turnbull v. Bowyer, 40 N. Y. 456. [2] Cundy v. Marriott, 1 B. & Ad. 696.
[3] Burrill v. Smith, 7 Pick. 291; 1 Parsons N. & B. 445.
[4] Farmers' Bank v. Vanmeter, 4 Rand. 553.
[5] Leach v. Hewitt, 4 Taunt. 731. See Carter v. Flower, 16 M. & W. 747, and Farmers' Bank v. Vanmeter, 4 Rand. 561.
[6] 1 Parsons N. & B. 560.

it becomes often a question of nicety to determine whether or not the steps taken by the holder to find the party to whom presentment should be made or notice given, or to ascertain his place of residence or business, amounted to the due diligence which the law exacts, and it is therefore important to define in what such diligence consists.[1] "It would be very hard, when the holder of a bill does not know where the indorser is to be found, if he lost his remedy by not communicating immediate notice of dishonor of the bill, and I think the law lays down no such rigid rules. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses due diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice of the dishonor of the bill, within the usage and custom of merchants."[2]

§ 1115. *What constitutes diligence.*—Due diligence in making presentment for payment, and in communicating notice, consists, as a general rule, in making inquiries of such accessible persons, as from their connection with the transaction, or place, or parties, are likely to be informed, and in acting in accordance with the information derived from them.[3] The holder is not bound to inquire further than a reasonable and prudent man should, and every possible exer-

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[1] See on this subject, Story on Bills, § 351.

[2] Bateman v. Joseph, 2 Camp. 463; 12 East, 433, Lord Ellenborough; Garvier v. Downie, 33 Cal. 176.

[3] Lambert v. Ghiselin, 9 How. 452. In this case inquiry was made of a person trading at a particular place, who said that the indorser lived in the same place with him. Held sufficient. It was held, also, that if due diligence were used in sending notice, and it turned out to have been sent to the wrong place, it was not necessary for the holder on ascertaining the fact to send another to the right place. In Bank of Utica v. Bender, 21 Wend. 643, inquiry of the drawer as to residence of his accommodation indorser, and acting on the information given, was held sufficient, although the notice went to the wrong place. So where inquiries were made at the banks of the place where the bill was dated, and the information received acted on, it was likewise held sufficient, though notice went amiss. Chapman v. Lipscombe, 1 Johns. 294. So where inquiry was made of the second indorser (Ransom v. Mack, 2 Hill, 587); and of the maker's son (Sturgis v. Derrick, Wight. 76); it sufficed in each case. Greenwich Bank v. De Groot, 14 N. Y. S. C. (7 Hun), 212.

tion is not exacted of him. An inquiry of the officers of the bank where the note was discounted is sufficient, if there be no others near likely to know the indorser's residence, when seeking to send him notice.[1] But an inquiry at the bank where the paper was deposited for collection, and consulting a directory, would not alone be sufficient.[2]

In a late New York case, Daniels, J., said:[3] "Both the rule of the commercial law and of the statute, requires that the holder shall obtain the information which diligent inquiry can secure, concerning the residence of the party to be charged by the service of notice. And that is not shown by merely consulting the directory, when other sources of accurate information may be within the convenient reach of the person whose duty it may be to secure it, through which it can be obtained." Acting on information received from the maker of a note, after consulting the directory, would be sufficient, although a wrong address were given.[4]

§ 1116. In seeking the acceptor or maker to make presentment of the bill or note, due diligence would necessitate an inquiry of the indorser or other party to the instrument, when such party can be conveniently found, before dishonoring it by protest for non-payment, it being presumed from the relations of the parties, that they would be likely to know the whereabout of each other.[5] And for the same reasons, in seeking to ascertain the whereabout of the indorser or

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[1] Harris v. Robinson, 4 How. 336. McLean, J., dissenting, on the ground that notary should have inquired of the holder, and saying: "It is a new principle in the law of agency, that the knowledge of the principal shall not affect him, provided he can employ an agent who has no knowledge on the subject." The particular point decided in this case has been dissented from. See Fitler v. Morris, 6 Whart. 406.

[2] Packard v. Lyon, 5 Duer, 82; see Gilchrist v. Downell, 53 Mo. 691.

[3] Greenwich Bank v. De Groot, 14 N. Y. S. C. (7 Hun), 213 (1876). To same effect see Baer v. Leppert, 19 N. Y. S. C. (12 Hun), 516.

[4] Gawtry v. Doane, 51 N. Y. 92.

[5] Wheeler v. Field, 6 Metc. 290; Grafton Bank v. Cox, 13 Gray, 505; Porter v. Judson, 1 Gray, 175.

drawer in order to communicate notice, inquiries should be made of the maker or acceptor.[1]

It is desirable that this rule should be strictly observed, as well for the sake of uniformity as for the reason that it secures diligence. There may be exceptions to its application, but as a rule it is worthy of application. The holder should not fail to communicate any knowledge he may have as to the residence or place of business of the party to whom the notary is to make presentment or give notice, and if he does not do so he will be bound by any consequent mistake made by the notary, and the drawer or indorser will be discharged.[2] And the holder will always be presumed to know the residence or place of business of his immediate indorser.[3]

§ 1117. When there is more than one indorser, and he cannot give the desired information as to the whereabout of maker or acceptor, the inquiry should be continued to the other indorsers.[4] There may be exceptions to the rule, how-

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[1] Whitridge v. Rider, 22 Md. 558; Weakly v. Bell, 9 Watts, 273 Waters v. Brown, 15 Md. 285; Earnest v. Taylor, 25 Tex. (supp.) 37; Harrison v. Robinson, 4 How. 336.

[2] Smith v. Fisher, 24 Penn. St. 222; Haly v. Brown, 5 Penn. St. 178; Fitler v. Morris, 6 Whart. 406; Lawrence v. Miller, 16 N. Y. 235.

[3] Lawrence v. Miller, *supra*.

[4] Hill v. Varrell, 2 Greenl. 233; Gilchrist v. Donnell, 53 Mo. 591. In this case a notary public not knowing the residence of an indorser, on the day of protest made inquiry at the bank of St. Louis, where the note was payable, and at the place of business of another indorser, and examined the city directory to ascertain the residence, but without success. He thereupon placed the notice in the city post-office. The evidence showed that other indorsers could have given the desired information, and that one of them lived in East St. Louis, immediately across the river. *Held*, that it was the duty of the notary to inquire at least of all the parties to the note, if accessible; and that he might have prosecuted his inquiries for that purpose for several days; and there was no search made, such as the law requires, and that putting the notice in the post-office under the circumstances amounted to nothing.

Wheeler v. Field, 6 Mete. 290. In this case the notary inquired at the office of the third indorser the whereabout of the maker and the other indorsers, and was told that the third indorser was out, but that a person living near by could give the desired information. This person on being asked did not know where the parties lived. The notary then protested the note; and it was held that the third indorser was discharged, Wilde, J., saying: "It cannot be doubted that if inquiries had been made of the payee or the other indorsers, the maker's place of

ever. As, for instance, when the maker or acceptor has left the State;[1] and it would not, we think, be necessary to pursue the inquiry of the maker, indorser or other party, if, from previous answers of parties likely to know, the holder had received any information sufficiently reliable. Where the notary, desiring to give notice, finding the indorser's house closed, inquired of the nearest resident, and was told that he was out of town on a visit, for how long informant did not know, it was held that further inquiry was unnecessary.[2] But it would be advisable in all cases not to leave room for such questions to be raised.

§ 1118. If the doors of the business office of the acceptor or maker are closed, and there be no one there to answer the demand after repeated calls, it has been held by high authority that the bill or note may be protested without making further inquiries; for he is bound to have a suitable person there to answer inquiries and pay his bills and notes, if there demanded.[3] And in the case of a bill accepted by a firm, in

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residence might have been ascertained." [But in England inquiry of the last and next to last indorser, as to the whereabout of the first indorser, was held sufficient. Browning v. Kinnear, Gow. 81; Chitty on Bills, *453.]

[1] Grafton Bank v. Cox, 13 Gray, 505, Merrick, J., saying: "If the maker had at the maturity of the note resided in Boston, or in the State, or at any place to which the holder would have been bound to resort to demand payment of him, and there was reason to suppose that the indorser had knowledge of such residence, the omission to inquire of him concerning it would have been a failure to use diligence, and would have had the effect to discharge the indorser from his liability."

[2] Williams v. Bank U. S. 2 Pet. 100. In 1 Am. Lead. Cas. 405, it is said: "The holder may rely upon information derived from the agent of the indorser to be affected, or from the drawer of an accommodation bill or maker of an accommodation note, indorsed and discounted for his benefit, or from his agent, or from a subsequent indorser who professes to know and is interested to speak truly; but not on the statements of mere strangers having no connection with the parties, and no probable knowledge of them, unless it appear that no better information can be had."

[3] Baumgarden v. Reeves, 35 Penn. 250, Thompson, J., saying: "Where the presentation and demand has been attempted to be made at the maker's place of business, and there is no one to answer, and there is no proof that the party had any other place of business, or had removed, the authorities estimate this as equivalent to actual presentation and demand. * * A different case might be presented if the proof was that the call was at the residence of the maker and his

such a case it would not be necessary to call individually upon one of the partners who has a residence in the city, or make any further inquires for the acceptors than the repeated calls at their office.[1] It would be safer, however, to make some further effort to find the payor when the doors are found closed, as the authorities are not uniform on this question.[2] If the acceptor's or maker's place of business has been permanently closed, and he has a domicile in the city or town, presentment should be made there.[3] This ruling intimates, as we think, the true distinction to be taken. If the place of business be permanently closed, it would be right to seek the payor at his domicile in the same place, if he have one, as

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house was shut up." See also Berge v. Abbott, 83 Penn. St. 159; 1 Parsons N. & B. 457; Story on Bills, § 352; Story on Notes, § 235; Bynum v. Apperson, 9 Heisk. 625.

[1] Watson v. Templeton, 11 La. Ann. 137; Wiseman v. Chiapella, 23 How. 368, Wayne, J., saying: "All merchants register their acceptances in a bill book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally to avoid payment, and, on that account, that further inquiries need not be made for them before a protest can be made for non-payment. Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor has been deemed proper, and in which such inquiries, not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment had been made in the business hours of the day; but in no case has the latter ever been presumed in favor of an acceptor, whose place of business has been so closed that a demand for payment could not be made there upon himself, or upon some one left there to attend to his business." Shed v. Brett, 1 Pick. 413, the case of a note in which no place of payment was specified. But see Granite Bank v. Ayres, 16 Pick. 394.

[2] Collins v. Butler, 2 Stra. 1087; 1 Parsons N. & B. 457, note y; Story on Bills, § 352; Ellis v. Commercial Bank, 7 How. (Miss.) 294. In Otto v. Belden, 28 La. 302, suit was brought against the indorser of a note who resided in the city. The Court said: "The certificate of the notary is, that he went several times to the office of the drawer (maker) to demand payment thereof, and that he found the doors closed, and no one in or about the premises of whom the demand could be made. No demand was made of the maker. Therefore the indorser is discharged." See also Story on Notes, § 238.

[3] Granite Bank v. Ayres, 16 Pick. 392.

that would be the place where he would be most likely found. But as long as he has a place of business, it is his duty to keep some one there to respond to business demands. That remains the place where he would be naturally and properly sought, and when he closes doors, it is presumable that he declines to meet the usual business engagements.

§ 1119. If the holder, on the day of maturity, finds the bank or other place of payment closed, he is not bound to make any further demand to charge either drawer[1] or indorser.[2] If the paper is payable at a certain bank that has ceased to exist, or at the counting-room of a firm which has dissolved before its maturity, it will certainly be sufficient to make presentment to the bank which has succeeded the former institution, if such there be,[3] or at the counting-room of the succeeding firm, if such there be.[4] Where a note was payable at "the Bank of the U. S. at Mobile," and before its maturity that bank had been sold out to the "Bank of Mobile," and ceased to have a place of business in Mobile, it was held that presentment at the Bank of Mobile was sufficient.[5] The like rule prevails as to notice. Where the holder, on the day of maturity, found the indorser's dwelling-house shut up, the doors locked, and the family out of town, as he learned from the next neighbor, on a visit of unknown duration, it was held that due diligence had been exercised to give notice, and the indorser was liable.[6] So where the cashier found the drawer's counting-room closed, and no one there to answer, it was held sufficient.[7]

§ 1120. Inability to find the maker or acceptor does not excuse want of notice to drawer or indorser;[8] but inability

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[1] Hine v. Allely, 4 B. & Ad. 624; Central Bank v. Allen, 16 Me. 41; Apperson v. Bynum, 5 Cold. 349; Rogers v. Langford, 1 C. & M. 637; Sands v. Clarke, 19 L. J. C. P. 84; Edwards on Bills, 498; see Howe v. Bowes, 16 East, 112; 5 Taunt. 30; Lane v. Bank of West Tenn. 9 Heisk. 419.

[2] De Wolf v. Murray, 2 Sand. 166; Derg v. Abbott, 83 Penn. St. 158.

[3] Central Bank v. Allen, 16 Me. 41; Roberts v. Mason, 1 Ala. 373; Bynum v. Apperson, 9 Heisk. 637.

[4] Sanderson v. Oakey, 14 La. 373.

[5] Roberts v. Mason, 1 Ala. 373.

[6] Williams v. Bank U. S. 2 Pet. 96.

[7] Crosse v. Smith, 1 M. & S. 545.

[8] 1 Parsons N. & B. 527.

to find the drawer or indorser, or ascertain his whereabout, after exercising due diligence, does excuse want of notice, because it is then impossible.[1] But the holder must continue his inquiries from day to day, and give notice as soon as he does ascertain the party's whereabout—the excuse being co-extensive only with the necessary delay; and the impediment being only temporary, the duty revives with its cessation.[2]

Delays of one day,[3] of three days,[4] of nine days,[5] of over two months,[6] of four months,[7] have, under the particular circumstances, been excused.

The imprisonment of the party is no excuse for want of demand, protest or notice.[8]

§ 1121. When inquiry is among the public generally, it should not be abandoned until all prospect of results disappears. Where inquiry was made by the notary in a place of persons at the hotel bar room, on the street, and at the post-office, it was held not sufficient, and the Court said: "If he had been told by some credible person, who would be likely to know the fact, he might have acted upon that information without pushing his inquiries further. But until some one is found who professes to be able to give the required information, it will not do to stop short of a thorough inquiry at places of public resort, and among such persons as would be most likely to know the residence of the indorser."[9] If the business men of a place give distinct information that the party sought resides at a certain other place, such information may be acted upon with safety, though erroneous.[10] "Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered."[11]

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[1] Ibid.

[2] See *ante*, Chapter XXX.

[3] Browning v. Kinnear, Gow. 81.

[4] Bateman v. Joseph, 2 Camp. 461.

[5] Baldwin v. Richardson, 1 B. & C. 245.

[6] Firth v. Thrush, 8 B. & C. 387.

[7] Sturgis v. Derrick, Wight, 76; see 1 Parsons N. & B. 527, note k.

[8] Story on Bills, § 318.

[9] Spencer v. Bank of Salina, 3 Hill, 520. See Peet v. Zanders, 6 La. Ann. 364.

[10] Brighton Market Bank v. Philbrick, 40 N. H. 506.

[11] Bank of Utica v. Bender, 21 Wend. 643, Bronson, J., *ante*, § 1117.

§ 1122. If the party to be notified is traveling, or is absent from home for any reason, and his present address is known to the holder, or if his absence from home is known, and the holder has any means of learning his address, or of ascertaining whom he has left behind to attend to his business, it would probably be his duty to send notice accordingly.[1] But if a party leaves home without taking the usual and proper precautions to facilitate sending business communications to him, undoubtedly this is his fault, and he can relieve himself from no responsibility by such fault, and will be held to all parties as if duly notified, provided due diligence be used.[2]

§ 1123. If after due diligence neither the maker nor his usual place of residence or business can be found, presentment to him will of necessity be excused, and the indorser held liable without it. Thus, where the maker of a note is a sailor who has no established place of abode, and is at sea when the note matures, proof of these facts will constitute excuse for non-presentment.[3] But if he has a place of residence where his family are living when the note matures, it will be necessary to present it there.[4]

SECTION III.

RECEIVING THE BILL OR NOTE TOO LATE, AS EXCUSE FOR WANT OF PRESENTMENT AND NOTICE.

§ 1124. In the *third* place, where the payee, or subsequent indorsee, does not transfer and indorse the bill or note until so near its maturity that it is then impracticable on account of the distance from, or inaccessibility to the place where the maker or acceptor has his place of business or residence, or where the bill or note is payable, the payee, or other indorser so transferring it, will be presumed to

[1] 1 Parsons N. & B. 493.
[2] Ibid.
[3] Moore v. Cofield, 1 Dev. 247; Taylor v. Snyder, 2 Den. 145.
[4] Whittier v. Graffam, 3 Greenl. 82; Dennie v. Walker, 7 N. H. 199.

have waived the taking of these steps which they must have known were impossible.[1] This excuse, however, will only avail as between the immediate parties who have transferred and received the instrument at so late a period; for as to the previous parties who transferred it long enough before maturity to leave adequate time for its due presentment, they have a right to insist on the strict performance of their obligations by those who are subsequent holders, and it is the folly of such holders to take the instrument so late that they cannot hold all the parties liable upon it.[2] This doctrine is favored by the later text writers, and seems entirely sound, and though Chitty states a different one, it does not seem to be sustained by the case he cites to its full extent.[3]

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[1] 1 Parsons N. & B. 456; Story on Bills, § 326; Story on Notes, §§ 203, 265. (But all of the American cases cited by Story in his note do not enunciate the doctrine.)

The broad doctrine is stated in Freeman v. Boynton, 7 Mass. 483, and some early cases, that distance is in itself an excuse for delay, and that the holder may wait for the maker to come and pay. See Haddock v. Murray, 1 N. H. 140; Barker v. Barker, 6 Pick. 80. But they find no favor in the latter authorities.

[2] Ibid.; Bayley on Bills, Chap. VII. Sec. I, p. 149; Story on Notes, § 265; Mason v. Pritchard, 9 Heisk. 798.

[3] In Anderton v. Beck, 16 East, 248, it appeared that, on December 26th, plaintiff received in Yorkshire a bill on London, payable there the 28th. He kept it till the 29th, and then sent it to the Lincoln Bank, which forwarded it to London without delay, and it was presented for payment on January 2d. The court decided that the holder had been guilty of laches in keeping the bill from the 26th to the 29th, and had lost his remedy against drawer and indorser. In Chitty on Bills (13th Am. ed.) [*389], 440, it is said: "But the circumstance of the holder having received a bill very near the time of its becoming due constitutes no excuse for a neglect to present it for payment at maturity, for he might renounce it if he did not choose to undertake that duty, and send the bill back to the party from whom he received it; but if he keep it, he is bound to use reasonable and due diligence in presenting it. * * * But it has been considered in France, that if an indorser himself transfers a bill so late to the holder as to render it impracticable to present it precisely at maturity, he cannot take advantage of a delay in presentment so occasioned by himself, though the prior indorser and the drawer may." See also Thomson on Bills (Wilson's ed.), 297.

SECTION IV.

SICKNESS OF OR ACCIDENT TO THE HOLDER.

§ 1125. In the *fourth* place, when sudden illness or death of or accident to the holder or his agent prevents the presentment of the bill or note in due season, or the communication of notice, the delay is excused, provided that presentment is made and notice given as promptly afterward as the circumstances reasonably permit.[1] This doctrine rests upon the same principle as that which excuses want of punctuality when overwhelming calamities or accidents of a general nature prevent. Pothier states that where the holder transmits a bill to a distant correspondent for presentment and payment, and the latter dies suddenly on the eve of the time when the bill ought to be paid or protested for dishonor, it will be sufficient if the presentment is made within a reasonable time after the holder is informed of the accident, and is enabled to give orders to receive the money. And he puts the sudden illness of the holder or his agent on the same footing.[2] It is said by Mr. Chitty that "it has been considered that the detention of the bill by contrary winds, or the holder having been robbed of the bill, or the like, would afford an adequate excuse, provided he present it as soon afterward as he is able."[3] He adds, however: "But a notice of the reason why the bill itself cannot be produced should be given; and a demand of payment should, if possible, be made on the very day the instrument falls due; and if it be a foreign bill, it should be duly protested, in case the drawee should refuse payment." In a subsequent portion of his

[1] Story on Bills, § 308; Chitty on Bills (13th Am. ed.) [*330, 451, 491], 370, 509, 556; Thomson on Bills (Wilson's ed.) 280, 368; 1 Parsons N. & B. 267; Edwards on Bills, 649; Duggan v. King, Rice, 239; White v. Stoddard, 11 Gray, 258; Aymar v. Beers, 7 Cow. 705; Lord Kenyon, C. J., in Hilton v. Shepherd, 6 East, 16; Chitty, Jr., 710. See *ante*, Chapter XVII, § 478, vol. 1.

[2] Pothier De Change, n. 144; Chitty on Bills (13th Am. ed.) 509, note a; Story on Bills, § 309.

[3] Chitty on Bills (13th Am. ed.) [*389], 439.

treatise, he places the circumstance of the robbery of the bill upon the same footing as its loss or destruction, and as not excusing delay in demand or notice.[1] And we cannot see that the robbery is distinguishable from the loss or destruction of a bill or note, in which event demand should be made upon a copy, and notice given accordingly.

§ 1126. There seems to be no dissent to the opinion that the sudden illness or death of the holder or his agent is a sufficient excuse for delay. Where an agent, intrusted with a note to collect, died four days before its maturity, after a month's sickness, and the note was discovered by his executrix a month after his death, in a desk where it was locked up, and he immediately caused presentment and notice, the indorser was held liable.[2] And when the holder himself was dead at the time the note matured, and there was no presentment or notice, there being no personal representative to act in the premises, it was held that, as the proper steps were taken as to presentment and notice within a reasonable time after a representative was appointed, the indorser was charged.[3]

§ 1127. The illness, in order to constitute a sufficient excuse, must be that of the holder or his agent, and of such a character as to prevent due presentment and notice by the exercise of due diligence. And where an indorser was called from home, in consequence of the dangerous illness of his wife, and left his house in care of a lad, without authority to open letters, it was held that he had lost recourse against his prior indorsers by the consequent delay in giving notice.[4] He should have left some one in charge with authority to open letters.

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[1] Chitty on Bills (13th Am. ed.) [491], 556.

[2] Duggan v. King, Rice, 239.

[3] White v. Stoddard, 11 Gray, 258; Story on Bills, § 365.

[4] Turner v. Leach, Hilary Term, 1818; Chitty on Bills (13th Am. ed.) [*452], 509; 1 Parsons N. & B. 532; Thomson on Bills (Wilson's ed.) 368.

CHAPTER XXXIV.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST AND NOTICE, ARISING FROM THE CONDUCT OF THE PARTY.

SECTION I.

WHEN PARTY HAS RECEIVED MEANS TO TAKE UP THE BILL OR NOTE.

§ 1128. In the *first* place, the receiving by the drawer or indorser of money from the acceptor, maker or other party for whose benefit the bill or note was made, for the avowed purpose of taking up the bill or note at its maturity, dispenses as to such drawer or indorser with the necessity of a presentment to the acceptor or maker, for the obvious reason that the indorser becomes himself the person who should meet it. And so receiving any other property, with the agreement that he shall apply its proceeds to paying the bill or note at its maturity, has the same effect.[1]

The indorser in such cases has no remedy over against any one. His arrangement with his principal substitutes him in that principal's place; and it would be a fraud for him to throw back upon him the burden which he had assumed when provided with the means to bear it.

These reasons apply with equal force to notice; and that, as well as the demand, under such circumstances, is dispensed with.[2]

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[1] Ray v. Smith, 17 Wall. 418 (see *post*, § 1143); Bond v. Farnham, 5 Mass. 170 (demand and notice held waived); Cornay v. Da Costa, 1 Esp. 302; Watkins v. Crouch, 5 Leigh, 522; May v. Boisseau, 8 Leigh, 185, 196; Story on Notes, § 281; Bayley on Bills, ch. VII, sec. 2, p. 202.

[2] Ibid.; Story on Notes, § 357; Story on Bills, §§ 316, 374.

SECTION II.

WHEN PARTY HAS RECEIVED SECURITIES OUT OF WHICH TO PROVIDE FOR PAYMENT.

§ 1129. In the *second* place, the receiving of security or indemnity from the maker, or other party for whose benefit the bill or note was executed by the indorser, has been often held to operate as a dispensation of demand and notice as to him. But there is great contrariety in opinion and decision on this subject, and many subtle refinements entered into contradistinguishing particular cases. When the acceptance of the security is accompanied by any express argument that the indorser is himself to provide for the payment of the bill or note, the dispensation is clear, whether he undertakes to do so out of the security, or to look to that for reimbursement. And so it is clear also, when an agreement to this effect is implied by all the circumstances of the case. But in the absence of proof of any express agreement, the question whether or not demand and notice, or either, have been dispensed with, has been thought by some to turn on the intention of the parties, and by others on the effect of taking the security; and the time it was taken, its character and sufficiency, the form of the assignment, and whether or not it comprised all of the maker's property, have been considered in determining it.

§ 1130. (1) *Assignment of all the maker's property.*—The doctrine is laid down by many authorities that the acceptance of an assignment of all the maker's property, by the indorser, to secure him against his liability, is a waiver of all right to require demand, protest and notice,[1] even when it is insufficient for that purpose.[2] Under such circumstances, it is

[1] Watkins v. Crouch, 5 Leigh, 522, *obiter*, Tucker, P.; Duvall v. Farmers' Bank, 9 Gill & J. 31; May v. Boisseau, 8 Leigh, 213, *obiter*, Tucker, P.; Kramer v. Sandford, 4 Watts & S. 328, Gibson, C. J.; Swan v. Hodges, 3 Head, 251, *held*, must be all or enough; Edwards on Bills, 637; 1 Parsons N. & B. 560, but see 571.

[2] Watkins v. Crouch, 5 Leigh, 522, Tucker, P. (as to notice only).

urged, the indorser prevents the holder from obtaining payment of the maker, by taking into his own hands all his available means; and he must be considered as holding out that he has assumed the responsibility of payment upon himself.[1] But it should be remembered, that if the indorser's liability is not fixed, the consideration of the assignment so far as he is concerned fails. He cannot then exercise any right of lien upon it, and it reverts at once to the maker, and is liable for his debts. The indorser is precisely in the same situation as if no assignment had been taken,[2] and so is the maker. Besides, even where the whole property has been assigned, the maker may have new accessions,[3] or he may be successful in negotiations, which render him perfectly ready to pay. These circumstances are worthy of consideration,[4] but they are not the controlling reasons for requiring demand and notice.[5]

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[1] Bank of South Carolina v. Myers, 1 Bailey, 412, the indorser had taken from the maker a confession of judgment which covered his whole estate; *held*, a waiver of demand and notice.

[2] Dufour v. Morse, 9 La. 333, Martin, J., said: "Here the indorser received nothing but a mortgage for his indemnification. He might well expect that the duty and interest of the maker would prompt him to prevent the protest of the note. He knew that the only obligation he had incurred towards the holder of the note, was to pay it in case the maker did not, and after being duly and legally notified of the failure and neglect of the maker to take it up; toward the latter, the indorser incurred no obligation. The mortgage was a useless paper in the hands of the defendants. The inchoate and conditional obligation which resulted from the indorsement never became perfect and absolute. The indorser, nor those who represent him in this case, have not suffered, nor can they now suffer any injury for the indemnification of which they could resort to the mortgage. The defendants are precisely in the same situation as they would be if no mortgage had been taken."

[3] Watkins v. Crouch, 5 Leigh, 522, Cabell, J.: "The indorser's right to notice from the holder depends on another principle, namely, his remedy over against the maker. And this principle applies as forcibly to a case where a part only of a note remains so unpaid or unprovided for. Again, the assignment on this case was made about a month before the note was to fall due. It is impossible for us to say that no accession was made, in that interval, to the maker's means of payment; and of course we cannot say that notice to the indorser would have been unavailing."

[4] 1 Parsons N. & B. 567.

[5] Kramer v. Sanford, 4 Watts. & S. 828, Gibson C. J.: "The chance of the

§ 1131. A sufficient answer to the argument, that the indorser ought to be bound in such cases, may be given in the observation, that the holder loses nothing that he can subject to the payment of the debt, and any arrangement merely for the indorser's indemnity is a matter entirely between him and his principal. The case of Bond v. Farnham, 5 Mass. 170, has often been quoted as authority for the doctrine that the assignment of all the maker's property, even when insufficient, is a waiver of notice,[1] and its influence has been sensibly felt in relaxing the requirement of demand and notice in the United States. But there were particular features in that case which have not been sufficiently distinguished, and like the case of Cornay v. Da Costa, 1 Esp., it has been made the pillar of a doctrine which it by no means upholds. The maker had assigned all his property to the indorser, who took it, as Chief Justice Parsons said: "for the express purpose of meeting this and his other indorsements," and it was held that he could not afterward "insist on a fruitless demand upon the maker, or on a useless notice to himself to avoid payment of demands, which, on receiving security, he has undertaken to pay." Thus understood, the principle decided conforms to the doctrine of the text, and though it has been supposed that the case has been overruled by more recent decisions in Massachusetts, there seems to us no conflict between them.[2] The case of Creamer v. Perry[3] meets, as it seems to us, fully the argument that an assignment of all the maker's property to a trustee accepted by the indorser waives demand and notice, the true construction of the act being, as said by Chief Justice Shaw, "to secure and indemnify him against his legal liabilities. And as his liability as indorser

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maker's acquiring other property to which he might resort, if the funds in his hands should fall short, is so inconsiderable as to fall within the maxim *de minimis*."

[1] Barton v. Baker, 1 Serg. & R. 334; Watkins v. Crouch, 5 Leigh, 522, Tucker P.

[2] 1 Parsons N. & B. 560. The learned author thinks it irreconcilable with Creamer v. Perry, 17 Pick. 332; but it seems to us otherwise.

[3] 17 Pick. 332.

of the note was conditional, and depended upon his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency." Even where there is an assignment or mortgage directly to the indorser himself, unless it were in a form to show that it was to enable him to take up the note, and he assumed to do so, it is now held in Massachusetts that it would not amount to a waiver of demand or notice,[1] and the strict rule is of late finding favor.[2]

The opinion of Chief Justice Nelson in an often quoted case might seem to sustain a contrary doctrine, and has been so considered; but it will be seen that it does not necessarily require that construction.[3]

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[1] Haskell v. Boardman, 8 Allen, 39. The maker executed mortgages of all his real and personal estate to the indorsers, the condition being that the grantor should "fulfill and perform all contracts which the said grantees have heretofore signed, indorsed or executed for the said grantor, and which said grantees shall hereafter sign, indorse or execute for said grantor as indorsers, guarantors, sureties or otherwise, and save the said grantees harmless from all costs and expense in consequence thereof." There was due demand, but notice was not received in due season. The indorsers were held discharged, Bigelow, C. J., saying: "There was no evidence offered at the trial on which a waiver of notice by the indorsers could be legally found. The mortgage relied on to show such waiver was not made to enable the indorsers to pay the notes, nor were they authorized to appropriate the property thereby conveyed to such purpose. The defect of the conveyances was only to secure the defendants against the legal liabilities assumed by them in behalf or on account of the promisor. Their liability as indorsers was conditional only, dependent on the contingency of their having due and seasonable notice of the dishonor of the notes. Their claim on the property for indemnity was dependent on the like contingency. On this point the case is within Creamer v. Perry, 17 Pick. 332."

[2] In Wilson v. Senier, 14 Wis. 380, the Court said: "Nothing short of a general assignment and actual transfer of all the maker's effects, or the receipt of money or property by him for the purpose of satisfying the debt, and with an understanding that he is to do so—in which case he changes place with the maker and becomes himself the principal—has ever been held to create such dispensation, and the disposition of the court has been to restrict rather than to enlarge the doctrine." Moses v. Ela, 43 N. H. 560; Woodman v. Eastman, 10 N. H. 367.

[3] Spencer v. Harvey, 17 Wend. 489, Nelson, C. J., said: "Notice was supposed to have been dispensed with, on the ground that the indorser had taken indemnity of the makers by means of a judgment upon which execution has been issued; but it is extremely uncertain if anything will be realized out of the property, The security is already in litigation in chancery. The mere precaution by an

§ 1132. Where there was an assignment in trust to the indorser himself as trustee, or co-trustee, of all the maker's property, upon trust, to dispose of it, and pay the maker's debts in a certain order, first satisfying the notes and debts on which the indorser and a certain firm were liable as sureties or indorsers, the acceptance of it was held a waiver of demand and notice; and under such circumstances it might be reasonably inferred that the indorser assumed the payment upon himself.[1]

§ 1133. (2) *Sufficiency of the security.*—The sufficiency of the security is by many authorities made the criterion of the question whether or not presentment and notice are dispensed with; and the reasoning by which the conclusion is reached by some that full security or indemnity dispenses with these conditions is, that in such cases "it is plain that the indorser can receive no damage from the want of a due presentment," as said by Justice Story in his work on Promissory Notes,[2] and by a number of judges in rendering decisions.[3] Others place the doctrine on the implied assump-

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indorser of taking security from his principal, has never been adjudged to operate as a dispensation of a regular demand and notice. It is, no doubt, a common occurrence, yet such effect has never been imputed to it. There must be something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the note; or he must have an assignment of all the property, real and personal, of the makers for that purpose. The notice is dispensed with when funds are received, upon the ground that the object for which it is required to be given, namely, to enable the indorser to obtain indemnity from his principal, has already been attained. Partial or doubtful security falls short of this, and leaves the rule requiring notice in full force."

[1] Mechanics' Bank v. Griswold, 7 Wend. 165.

[2] Story on Notes, § 281; see also Story on Bills, § 374. No distinction is between demand and notice in this particular.

[3] Watkins v. Crouch, 5 Leigh, 522, Carr, J. (security was insufficient); Marshall v. Mitchell, 35 Me. 221, Welles, J. (*obiter*); Walker v. Walker, 2 Eng. (Ark.) Oldham J. (presentment and notice held waived); Nelson, C. J. (the security was insufficient); Durham v. Price, 5 Yerg. 300, in which case the court instructed the jury that if the defendant had full indemnity, or promised to pay after maturity, with knowledge of the facts, demand and notice were waived. Barrett v. Charleston Bank, 2 McMullan, 191; Develing v. Ferris, 18 Ohio, 170; Kyle v. Green, 14 Ohio, 495; Stephenson v. Primrose, 8 Port. (Ala.) 155; Spencer v. Harvey, 17 Wend. 489, Nelson, C. J. (the security was insufficient).

tion of the indorser to pay.[1] If the question of damage determined an indorser's liability, it would be plain that sufficient indemnity fixed it; but when the maker is utterly insolvent, and indeed as well when he remains perfectly solvent, the indorser can in neither case suffer damage by default in demand or notice.

§ 1134. When the maker or acceptor is insolvent, he may lose nothing by default in demand and notice. If he is perfectly solvent, and has merely neglected payment, the indorser is indemnified against loss. True, there are contingencies under which he might lose, in the one case, as friends might have assisted the insolvent, and in the other as misfortune might overtake the solvent. But might not the indemnity depreciate, or be destroyed, or the opportunity to use it be lost? It seems to us a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal; or of security to himself, unless in taking the security he has stepped into the principal's shoes. And indeed when he has thus stepped into his principal's place, unless there be some privity with the holder in the arrangement, it is rather from his obligation to his principal, which the law transposes to the holder, than from any other consideration, that the holder is permitted to recover against him.

Chancellor Kent,[2] as well as Justice Story already quoted, has considered ample indemnity a dispensation with demand and notice; but on the other hand Professor Parsons,[3] and other eminent jurists have reached the conclusions which we express, and the grounds that these conclusions rest upon seems to us entirely unassailable.

It was well said in a New York case, by Ingraham, J.,

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[1] Watkins v. Crouch, 5 Leigh, 522, Tucker, P. [2] 3 Kent Com. 113.

[3] 1 Parsons N. & B. 571. In Kramer v. Sandford, 4 Watts & S. 329, a judgment bond was taken from the maker by the indorser in double the amount of the note, and judgment had been entered, and execution issued, and levied on sufficient personal property to pay the note, but it was held no waiver of demand, protest or notice, Gibson, C. J., delivering the opinion of the court.

"Mere security for the indorsement affords no reason for dispensing with demand. On the contrary, it furnishes a stronger reason why the indorser who holds the security should be informed of the non-payment. Without notice thereof he might suppose it to have been paid, and in consequence of such neglect have parted with his security."[1] And to the same effect in Connecticut, where the indorser held the goods for which the note was given as security, and there had been laches as to notice, Bissell, J., said: "From the fact that no notice was given, he would have a right to presume that the note was paid by the maker, and might thus be induced to part with his security."[2]

§ 1135. "If the security be to the full amount of the note, the indorser will be held liable, without notice, for the full payment of the note; if the security be partial, he will be bound *pro tanto*," says Mr. Justice Story, in his treatise on Promissory Notes;[3] but he quotes no authority for such a doctrine, and we have not found it so much as intimated by any other writer or jurist. And it seems, on the contrary, to be universally conceded that, unless the security is full, or comprises all the maker's estate, there is no waiver of demand,[4] and with a single exception,[5] the concession seems equally universal as to notice.[6] But even that exception does not adopt Story's doctrine. And where the sufficiency or the entirement of the assignment is urged as a waiver, proof of

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[1] Taylor v. French, 4 E. D. Smith, 458; see also Seacord v. Miller, 3 Ker. 55.

[2] Holland v. Turner, 10 Conn. 308. Where the indorser took mortgage to secure the note in suit and another, from the maker, held no waiver. Woodman v. Eastman, 10 N. H. 359.

[3] Story on Notes, § 357.

[4] Burrows v. Hanegan, 1 McLean, 309; Watkins v. Crouch, 5 Leigh, 522; Kyle v. Green, 14 Ohio, 495; Brunson v. Napier, 1 Yerg. 199; Wilson v. Senier, 14 Wis. 380; Holman v. Whiting, 19 Ala. 708; Woodman v. Eastman, 10 N. H. 359. In Brandt v. Mickle, 28 Md. 436, it was held that a transfer of part of the maker's property to the indorser did not dispense with demand and notice, although it covered all he had when the note fell due. Spencer v. Harvey, 17 Wend. 489, Nelson, C. J.; Chitty on Bills (13th Am. ed.) [*441], 496; 1 Parsons N. & B. 569, 570.

[5] Watkins v. Crouch, 5 Leigh, 522, Tucker, J.

[6] *Ante*, § 1134.

such sufficiency, or that it comprises the maker's entire estate, must be given.[1]

§ 1136. The opinion has been intimated that an insufficient assignment accepted by the indorser would operate a waiver of notice, but not of a regular demand. And it is based on the ground that the object of notice is to put the indorser on the alert, which cannot be necessary when he has been warned by the assignment, while the demand is a part of the holder's contract, which he must comply with strictly.[2] But the distinction rests on no well defined idea. Knowledge and alertness are not notice, and unless the indorser has placed himself in the maker's place, in which event neither demand nor notice would be necessary, he cannot be regarded as waiving any right as an indorser. And it has been so held.[3]

§ 1137. Some of the cases, while recognizing the principle that the criterion is whether or not the indorser has obligated himself to take up the note, consider that when he has received an assignment of the whole estate of the maker,[4] or has received an assignment adequate to meet the note,[5] that

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[1] Benedict v. Caffe, 5 Duer, 226; Duvall v. Farmers' Bank, 9 Gill & J. 31; Marshall v. Mitchell, 34 Me. 227.

[2] Watkins v. Crouch, 5 Leigh, 522, Tucker, P.

[3] Denny v. Palmer, 5 Ired. 610, Ruffin, C. J.

[4] Barton v. Baker, 1 Serg. & R. 334 (1815). In this case James Brown & Co. were makers of the note, and a few months before it was due, Armat Brown, one of the partners, made an assignment of his whole estate, for the purpose, amongst other things, of indemnifying the indorser against his indorsements on account of James Brown & Co. The sufficiency of the assignment did not appear, nor was it adverted to. Tilghman, C. J., said: "It is confessed that due notice was not given; but the plaintiff contends that, under the circumstances of the case, notice was not necessary. * * * Now, by the taking of this assignment, it is not unreasonable to presume that the defendant took upon himself the payment of the indorsed notes, especially as when he did receive notice (ten days after the note fell due), although he knew and remarked that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend upon the arrival of a vessel. I agree, therefore, with Bond v. Farnham, 5 Mass. 170, where it was held that in such a case the indorser dispenses with notice." Kramer v. Sandford, 4 Watts & S. 328, Gibson, C. J.

[5] Watkins v. Crouch, 5 Leigh, 522. In this case the assignment was to a trustee, and, amongst other purposes, to indemnify the indorser to the extent of one-fourth of the note. It was held no waiver of demand.

he places himself in the maker's shoes, and impliedly assumes its payment. But there have been circumstances connected with the transaction, in some of the cases at least, which strengthened that presumption on the part of the court;[1] and for the reasons already stated, we cannot perceive that the mere assignment of all of the maker's estate, whether it be sufficient or not, in itself creates an implied obligation on the part of the indorser to pay the note.

§ 1138. (3) *When security given at time of indorsement.*— When the security is given at the time the indorser becomes a party to the paper, whether it be in the form of collaterals deposited with him, or of a deed transferring real or personal property to trustees, to indemnify and hold him harmless, it could hardly be reasonably inferred that the indorser intended to dispense with any diligence on the part of the holder either in respect to demanding payment at maturity, or notifying him in case of default. The proper construction, as it seems to us, of the indorser's receiving such security, would be that if he became liable to pay the bill or note, he would resort to it as indemnity, and not to dispense with any of the conditions precedent to the fixing of such liability upon him. If he designed in the outset to be unconditionally bound he would naturally sign as a co-maker if it were a note, and as drawee and acceptor if it were a bill, or with express waiver of demand and notice written over his signature; and in becoming an indorser he indicates sufficiently by the very form of his contract that he requires due demand and notice before he will be charged. If demand is not made, or notice not given, we should say that the contingent liability against which he was indemnified had not accrued, and the consideration of the indemnity failing, it would revert to the party who had made it. But these inferences may be all met with proof that it was the agreement of the parties that the indorser should pay the note, and that

[1] Barton v. Baker, 1 Serg. & R. 334, *supra*.

the security was given either to provide the means of payment or to reimburse him.[1]

§ 1139. (4) *When security given after indorsement and before dishonor.*—When the security is given after the indorsement, during the currency of the instrument—that is, before its maturity—and nothing but the mere naked fact of its acceptance by the indorser appeared, the inference, as it seems to us, would arise that he became apprehensive that the party who was primarily liable might be unable to meet it, and that to provide for the contingency of having the liability devolved upon him, he had taken the security as indemnity against such liability; but that liability still being contingent upon due demand and notice, the mere fact that the indorser had guarded himself against personal loss, in whole or in part, would still seem to us to create no presumption that he designed to change the nature of his contract, and dispense with the conditions necessary to make his liability absolute. There is no privity with the holder in the subsequent arrangement between the principal and his indorser. The indorser does not change his contract, but only protects himself from loss, and it is going very far to say, that a transaction with one person, of itself affects his contract with a third. There may be circumstances, however, connected with the indorsement, or with the acceptance of security, which indicate an intention of the indorser to dispense with demand and notice; or from which such intention may be so strongly presumed that it would operate as a fraud upon his principal or the holder, to discharge him. These views are borne out by high authority.[2] "The true criterion," as expressed by Chief Justice Gibson, "seems to be the obligation to take up the note."[3]

§ 1140. (5) *When security is given after dishonor.*—As a general rule, it is the settled doctrine that where security is

[1] Bond v. Farnham, 5 Mass. 170.

[2] Haskell v. Boardman, 8 Allen, 38; Taylor v. French, 4 E. D. Smith, 458; 1 Parsons N. & B. 571, 572; Kramer v. Sandford, 4 Watts & S. 329.

[3] Kramer v. Sandford, 4 Watts & S. 328.

taken after dishonor of the instrument, the drawer or indorser taking it does not thereby waive the right to show any laches of the holder in respect to presentment or notice.[1] In Massachusetts, where the indorser took two assignments, the one before and the other after maturity, and it appeared that neither demand nor notice were in proper time, Shaw, C. J., said: "The second assignment does not affect the question; it does not appear to have been made till several days after the note became due."[2] And it has been said, in New York, that where the indorser takes an assignment after maturity, even supposing himself liable to pay the same, it will not amount to a waiver of the objection to want of due presentment or notice, "since it cannot justly be inferred that he intends, at all events, to make himself liable for the payment of the note, but he takes the security merely contingently, in case of his ultimate liability."[3]

Where, however, it is distinctly shown that the drawer or indorser, taking security after maturity, knew at the time of the holder's laches in respect to presentment or notice, the fact that he took the security would be a circumstance of evidence to show a waiver of the objection, though not conclusive, or perhaps even presumptive proof. Such, at least, is the view which seems to us correct. Further, we do not think the law could justly go, but the doctrine of the text, as above stated, is not without dissent.[4]

Taking an assignment of all the maker's property by the indorser to cover his liability to him, after dishonor, does not waive the want of notice, the note not being mentioned in the deed.[5]

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[1] Story on Notes, § 278; 1 Pars. N. & B. 595.

[2] Creamer v. Perry, 17 Pick. 332. To same effect, see May v. Boisseau, 8 Leigh, 164; Tower v. Durell, 9 Mass. 332; Richter v. Selin, 8 Serg. & R. 425.

[3] Otsego Co. Bank v. Warren, 18 Barb. 290.

[4] Debuys v. Mollere, 15 Mart. (La.) 318. And in 1 Parsons N. & B. 619, it is said: "There is certainly ground to contend that if an indorser takes security after maturity, this is evidence of demand and notice; for why should a person take these steps to secure himself unless his liability actually existed?"

[5] Walters v. Munroe, 17 Md. 154, Goldsborough, J., saying: "The deed to

§ 1141. (6) *Form of assignment, and character of security.*—The form in which the security is given may often be an important matter of consideration in determining whether or not the indorser assumed the payment of the note. When the property has been placed directly in his hands, and he has power to convert it immediately into money, slighter circumstances might suffice to complete the proof of such assumption by him, than when it has been conveyed to a trustee.[1]

In the latter case, unless there was plain language to indicate the contrary, the presumption would be strong that the trust was created as an indemnity in the event of liability being fixed; and in the former that presumption would still exist, if nothing but the mere assignment appeared, but it might be much more easily overcome by circumstances.[2]

§ 1142. The character of the security may also have a material bearing on the question. If before maturity the maker placed in the indorser's hands a sufficient sum of money, the latter's intention to assume the payment would

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Funsten" (the trustee) "was executed after the note had fallen due, and the question is, whether such a deed dispenses with proof of notice to the indorser. And we think a sufficient answer is, that this note is nowhere mentioned or referred to in the deed. But, then, it is said, if the defendant admits he was fully indemnified, that will excuse the want of notice. Whatever effect such an admission might have, if made by a party with full knowledge of the facts which discharge him from liability on the note, it is unnecessary for us to decide. In this case, the declaration of Munroe" (the indorser) "relied on is, 'that he was fully indemnified for all his liabilities for Harrison'" (the maker), "which must be understood to refer to his legal liabilities, and cannot be construed to deprive him of his legal defense in this case, based upon want of notice, without which he was not legally liable."

[1] Story on Notes, § 282; Denny v. Palmer, 5 Ired. 610.

[2] May v. Boisseau, 8 Leigh, 195. Brockenburgh, J., said: "It must be observed that there is a great difference between an absolute conveyance and a mere conveyance to a trustee, as an indemnity. In this case the property was not put into the hands of Peter Boisseau to pay off these particular debts, but into the hands of a trustee as an indemnity. It was designed too, to indemnify not only against these supposed indorsements, but against various other suretyships on which Peter was bound for Edward, and to secure a debt due from Edward to Peter, and a debt and an annuity due from Edward to his mother, Priscilla Boisseau." See also Tucker, P. p. 213; s. c. and Cabell, J., p. 204, and Cornay v. DaCosta, 1 Esp. 303.

be presumed; and if the security were bills, or notes falling due before maturity, or other securities readily made available, slighter circumstances would prove the assumption than if it consisted of real or personal property, which is not so easily convertible into money. And some of the cases have intimated that the acceptance of securities readily convertible is in itself an implied assumption to pay the note.[1]

A confession of judgment is *prima facie* but not conclusive evidence of waiver of laches in respect to demand and notice. "It may be evidence of an acknowledgment of liability, but is not conclusive evidence. It is not a legal presumption. It is capable of being explained and repelled by the circumstances under which it was given."[2]

§ 1143. Where the money or the security is received to meet a particular indorsement or indorsements, there is no waiver of demand or notice as to any other.[3]

In England it has been held, that where the acceptor told the drawer a few days before maturity that he could not pay the bill, and that the latter must take it up, and gave him a part of the money for that purpose; and the drawer received the money and promised to take it up; nevertheless he might still set up want of due presentment, and the money received as had and received to plaintiff's use.[4] This decision is quoted with apparent approval,[5] but it seems to us unjust.

The fact that the indorser has funds in his hands belonging to the maker, which he is merely authorized to apply to the payment of the note, but which he has not received for that avowed purpose, nor agreed to apply to that purpose, is no waiver of presentment, protest or notice.[6]

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[1] Dufour v. Morse, 9 La. 333; Kramer v. Sandford, 4 Watts & S. 328.

[2] Richter v. Selin, 8 S. & R. 425.

[3] Prentiss v. Danielson, 5 Conn. 175; Bond v. Farnham, 5 Mass. 170.

[4] Baker v. Birch, 3 Camp. 107; Chitty, Jr. on Bills, 848.

[5] Chitty on Bills (13th Am. ed.) [*338], 379; 1 Parsons N. & B. 587.

[6] Ray v. Smith, 17 Wall. 416.

SECTION III.

WHEN MAKER OR ACCEPTOR HAS ABSCONDED.

§ 1144. In the *third* place, the absconding of the maker or acceptor is a valid excuse.

When the payor of the bill or note has actually absconded between its execution and its maturity, and especially when he is notoriously insolvent, inquiries are unnecessary. Presentment to him personally is of course impossible, and presentment at his last place of residence or business is altogether unnecessary. The mere fact of absconding is all that it is necessary for the holder to show. This doctrine is well settled in England,[1] and by the current of American authorities;[2] and Massachusetts is perhaps the only State in which a contrary view is taken. The earlier authorities in that State were of the same tenor,[3] but the more recent cases have adopted a more rigid theory, placing the absconding debtor upon the same footing as one merely removing into another jurisdiction.[4] It is to be regretted that there is any departure from a principle so reasonable and so well settled.

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[1] Bayley on Bills, chap. vii, sec. 1, p. 196; Anonymous, Ld. Raym. 743. "It is clear," says Chitty (13th Am. ed.) [*367], 412, "that if the drawee has never lived at the place of address, or has absconded, this circumstance will sufficiently excuse the holder from not making further inquiries after him."

[2] In Lehman v. Jones, 1 Watts & S. 126, the Court said: "Where indeed the drawer of a note or the drawee of a bill has merely removed from the place of his residence indicated by the bill, it is the business of the holder to inquire for him and ascertain where he is gone, in order that he may follow him; but when he has secretly fled, an application at the place would lead to no information in respect to him; and the law requires nothing which is nugatory." Gillespie v. Hannahan, 4 McCord, 503; Wolfe v. Jewett, 10 La. Ann. 383; Taylor v. Snyder, 3 Den. 145; Duncan v. McCullough, 4 Serg. & R. 480; Bruce v. Lytle, 13 Barb. 163; Ratcliff v. Planters' Bank, 2 Sneed, 425, 455; Hunt v. Maybee, 3 Seld. 266; Story on Bills, § 351.

[3] Putnam v. Sullivan, 4 Mass. 45; Hale v. Burr, 12 Mass. 85; Shaw v. Reed, 12 Pick. 132; Widgery v. Munroe, 6 Mass. 449. These cases were positive and clear; and in one of them, Hale v. Burr, 12 Mass. 89, it was said: "It is well settled that if the promisor absconded before the day of payment, or has concealed himself, the necessity of a demand is taken away. Due diligence to find him is all that is required in the latter case; and in the case of absconding, even that is not necessary."

[4] Pierce v. Cate, 12 Cush. 190 (1853). In this case the doctrine is reversed,

Even when he had absconded to another place in the same State or country, the excuse for non-presentment would be sufficient, unless the holder knew where he was, in which case he should seek him.[1]

But the absconding of the drawee, acceptor or maker is no excuse for want of notice to the drawer or indorser, who all the more need to be put upon their guard.[2]

When the drawer or indorser has himself absconded, notice should be left at his last place of abode, or left with the person representing his estate;[3] but if he had no fixed place of abode, or it be unknown, and undiscovered after reasonable inquiries, and there be no known representative of his estate, want of notice is altogether excused.[4]

SECTION IV.

WHEN THE MAKER OR ACCEPTOR HAS REMOVED HIS DOMICILE TO ANOTHER STATE OR A FOREIGN COUNTRY.

§ 1145. In the *fourth* place, if between the time a note is made or a bill accepted and its maturity, the maker or acceptor removes from the place at which he resided and transacted business to another State or country, no obligation is imposed upon the holder to go out of his own State in order to make a demand upon him personally, or at his new place of residence or business.

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the court overruling instructions that "if the maker had absconded, leaving no visible property subject to attachment, no presentment of the note to the maker, or demand at the dwelling-house, or other inquiry for him, was necessary." The contrary doctrine was deemed so well settled, that the question was not discussed. See 1 Parsons N. & B. 450.

A return to the former ruling has been anticipated in Redfield & Bigelow's Cases, 452; but in Grafton Bank v. Cox, 13 Gray, 504, it has been reiterated.

[1] Reid v. Morrison, 2 Watts & S. 401; Duncan v. McCullough, 4 Serg. & R. 480. In Redfield & Bigelow's Cases, 339, it is said: "If the absconding is any excuse at all, it should be without reference to the locality of the hiding place, unless this is within the jurisdiction, and the holder knows where it is."

[2] May v. Coffin, 4 Mass. 341.

[3] *Ex parte* Rohde, Mont. & M. 430; 1 Parsons N. & B. 528.

[4] Story on Notes, § 356.

It will be sufficient under such circumstances to make a demand at the payor's last place of residence or business, and when that has been done due diligence requires no more.[1] Whether or not it requires this much is questioned, and it has been held that when the payor has gone into a foreign jurisdiction, no demand whatever is necessary either upon him personally or at his last place of residence or business, such removal placing him according to this view in the same position as if he had absconded;[2] but a mere removal would not warrant the supposition that the payor had not made arrangements to meet his obligations at his previous domicile; and the better opinion is that the holder would not exercise due diligence without presenting the bill or note at his last place of residence or business.[3] It would be sufficient, however, to present it at the last place of business, without inquiry at his last residence, or of the indorser as to his present residence.[4]

§ 1146. When the removal is to another locality within the same State or country, it is the duty of the holder to seek and demand payment of the promisor, at his new place of residence or business;[5] but when he has crossed the line into

[1] McGruder v. Bank of Washington, 9 Wheat. 598; Taylor v. Snyder, 3 Den. 145; Adams v. Leland, 30 N. Y. 309; Foster v. Julien, 24 N. Y. 28; Anderson v. Drake, 14 Johns. 114; Dennie v. Walker, 7 N. H. 199; Gist v. Lybrand, 3 Ohio, 308; Reid v. Morrison, 2 Watts & S. 401; Grafton Bank v. Cox, 13 Gray, 503; Wheeler v. Field, 6 Metc. 290; Central Bank v. Allen, 16 Me. 41; Gillespie v. Hannahan, 4 McCord, 503; Whittier v. Graham, 3 Greenl. 32; Herrick v. Baldwin, 17 Minn. 209; Cromwell v. Hynson, 2 Esp. 211; 3 Kent Com. 96; Chitty (13th Am. ed.), 318, 413; Story on Bills, § 451.

[2] Gist v. Lybrand, 3 Ohio, 307, in which case it is said: "Whether a demand should be made at any other place is not made a point, or adjudicated upon in that case (McGruder v. Bank of Washington). But it seems to us a clear consequence of the decision, that such a demand is unnecessary. The fact of removal commits the indorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note in the note itself." Dennie v. Walker, 7 N. H. 199; Foster v. Julien, 24 N. Y. 28 (Mason J., dissenting); Eaton v. McMahon, 42 Wis. 487.

[3] Wheeler v. Field, 6 Metc. 290; Grafton Bank v. Cox, 13 Gray, 503; 1 Parsons N. & B. 452; Redfield & Bigelow's Cases, 330.

[4] Grafton Bank v. Cox, 13 Gray, 503.

[5] Louisiana Ins. Co. v. Shamburgh, 7 Mart. (La.) N. S. 260, the maker having

another State or country, it matters not how near his new place of residence may be to his former one; the mere fact that he has passed into a foreign jurisdiction is sufficient to excuse non-fulfillment, either upon him personally or at his new place of residence or business.[1] This latter doctrine was applied by the United States Supreme Court where the maker removed from the District of Columbia to a new residence in Virginia only nine miles distant, and it seems well established,[2] though not without some dissent. In some cases, however, it has been held that in the event of a permanent removal beyond the State line, the holder must use reasonable efforts to ascertain the new place of residence, and give notice there.[3] In respect to notice, when the drawer or indorser entitled to it has left the State, it is sufficient to leave it at his last place of residence.[4]

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removed from New Orleans to Plaquemine, in Louisiana. Anderson v. Drake, 14 Johns. 114, the maker having removed from New York City to Kingston, in New York State.

[1] McGruder v. Bank of Washington, 9 Wheat. 598, Johnson, J., saying: "We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from an actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point there is no other rule that can be laid down which will not leave too much latitude as to place and distance. For his absconding or removal out of the kingdom, the indorser is held in England to stand committed; and although from the contiguity, and in some instances reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British Channel." To same effect see Gillespie v. Hannahan, 4 McCord, 503; Widgery v. Monroe, 6 Mass. 449.

[2] See *supra*.

[3] Barker v. Clark, 20 Me. 156; Phipps v. Chase, 6 Metc. 491.

[4] Herrick v. Baldwid, 17 Minn. 209.

CHAPTER XXXV.

SPECIAL WAIVERS OF PRESENTMENT, PROTEST AND NOTICE, AND OF THE EVIDENCE THEREOF, BY PROMISES TO PAY, AND PART PAYMENTS AFTER MATURITY.

SECTION I.

WAIVER BY PROMISE OF THE DRAWER OR INDORSER TO PAY, MADE AFTER MATURITY WITH KNOWLEDGE OF HOLDER'S DEFAULT.

§ 1147. In the *first* place, promises to pay after maturity, or acknowledgments of continued liability and obligation to pay, with knowledge that the usual steps of demand, protest, or notice were not duly taken, are almost universally regarded as absolutely fixing the liability of the drawer or indorser making them, and he will not afterward be permitted to set up the defense that the demand or protest were not made in point of fact, or the notice not given.[1] The doctrine, as thus laid down, is settled in England and in the United States, indeed almost wherever the law merchant prevails, though the particular grounds upon which it rests are the subject of difference of opinion, and there are authorities denying it altogether.[2]

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[1] Yeager v. Falwell, 13 Wall. 12; Sigerson v. Mathews, 20 How. 496; Reynolds v. Douglass, 12 Pet. 497; Thornton v. Wynn, 12 Wheat. 183; Salisbury v. Renick, 44 Mo. 554; Hughes v. Bowen, 15 Iowa, 446; Martin v. Winslow, 2 Mason, 241; Spurlock v. Union Bank, 4 Humph. 336; Hazard v. White, 26 Ark. 280; James v. Wade, 21 La. Ann. 548; Walker v. Rogers, 39 Ill. 279; Mathews v. Allen, 16 Gray, 594; Smith v. Curlee, 59 Ill. 221; Tardy v. Boyd, 26 Grat. 637; Carter v. Sprague, 51 Cal. 239; Givens v. Merchants' National Bank, 85 Ill. 444; Story on Bills, §§ 280, 320, 373; Story on Notes, 274, 275; 3 Kent. Com. lect. 44; 1 Parsons N. & B. 594; Byles on Bills (Sharswood's ed.) 349; Edwards on Bills, 650, 651, 652.

[2] Lawrence v. Ralston, 3 Bibb (Ky.), 102; Donelly v. Howie, Hayes & J. 436 (Irish Court of Exchequer). See also Catheart v. Gibson, 1 Rich. (S. C.) 10; Huntington v. Harvey, 4 Conn. 124.

The objection to it is placed upon the ground that the drawer or indorser is absolutely discharged by default of the holder in respect to making due presentment and giving notice; and that, being no longer a party to the contract, he cannot renew his liability by a new promise, unless it be supported by a new consideration.[1] This argument is a forcible one, but it has not impressed the courts, with few exceptional cases, as valid, and may be regarded as overruled and obsolete. And when we refer to the fundamental principles upon which the requirements of demand and notice are based, it seems more plausible than sound. The object of demand and notice is to secure the drawer or indorser from loss—not actual loss necessarily, but from any possible loss by delay in making the demand of payment of the principal party, and notifying the indorser of his default. The law presumes an injury, or at least his exposure to injury, when these steps have not been taken; but, as it exacts them rigidly from the holder, it allows him the advantage of any assurance from the drawer or indorser that no injury has been suffered, and that he will not avoid his liability by the mere chance of suffering it. Waiver is not, therefore, the revival of the claim of recourse against him, but a declaration that there was no ground for the only plea on which it could be discharged.[2] Indeed, while it is everywhere said that the indorser's liability is conditioned upon due demand and notice, it should be remembered that the condition is not a strict and absolute condition precedent as conditions in contracts construed by the common law. We have already seen that even overruling necessity does not exonerate a contractor at common law, while it is a well settled excuse for non-compliance with the requirement of demand and notice. And in the same liberal spirit, and for the benefit of trade, the obligation of the indorser is regarded rather as voidable by non-fulfillment of these conditions, than as actually

[1] Story on Notes, § 275; 1 Parsons N. & B. 611.

[2] Thomson on Bills (Wilson's ed.), 377; Edwards on Bills, 650, 651.

avoided. If he chooses to affirm rather than disaffirm his liability, it can injure no one to leave him to the exercise of his discretion.

§ 1148. It makes no difference, when the promise to pay is made with knowledge of laches, that the party making it did not know its legal effect as a waiver,[1] or that he had a legal defense to the bill or note,[2] for it is a maxim that ignorance of the law excuses no one. The contrary notion has been long since exploded,[3] though at one time it found favor.[4]

And it makes no difference at what particular time the promise is made. It may be after suit brought,[5] and even while a motion for a new trial is pending.[6]

§ 1149. *Proof of knowledge—how far essential to proof of waiver.*—Knowledge on the part of the drawer or indorser that the holder has been in default, in not making due presentment and giving notice, is an element of the waiver as indispensable as the promise itself, according to the American text writers on the subject and the great body of the adjudicated cases.[7] Thus, it has been decided by the United States

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[1] Third National Bank v. Ashworth, 105 Mass. 503; Hughes v. Bowen, 15 Iowa, 446; Pate v. McClure, 4 Rand. 164; Richter v. Selin, 8 Serg. & R. 425; Kennon v. McRea, 7 Port. (Ala.) 175; Bilbie v. Lumley, 2 East, 469, Stevens v. Lynch, 12 East, 38; Chitty on Bills (13th Am. ed.) [*503], 447; Story on Bills, § 320.

[2] Givens v. Merchants' Nat. Bank, 85 Ill. 444, Scholfield, C. J.: "The plaintiff in error says he was not aware at the time he made these promises that he had any legal defense to the note. * * * If it was because of his ignorance of the law, it cannot avail him, and he must be charged with full knowledge."

[3] Tebbetts v. Dowd, 23 Wend. 379.

[4] Chatfield v. Paxton, N. P., quoted in Bilbie v. Lumley, 2 East, 469; Freeman v. Boynton, 7 Mass. 483; Warder v. Tucker, Id. 449.

[5] Oglesby v. Steamboat Co. 10 La. Ann. 117; Hart v. Long, 1 Rob. (La.) 83.

[6] Hart v. Long, 1 Rob. (La.) 83.

[7] Thorton v. Wynn, 12 Wheat. 183. And to same effect, holding that it must be proved in addition to the promise itself, see Spurlock v. Union Bank, v. Humph. 336; Ford v. Dallan, 3 Cold. 67; Ticknor v. Roberts, 11 La. 14; Blum v. Bidwell, 20 La. Ann. 43; Walker v. Rogers, 40 Ill. 278; Van Wickle v. Downing, 19 La. Ann. 83; Baskerville v. Harris, 41 Miss. 535; Harvey v. Troupe, 23 Miss. 538; Farrington v. Brown, 7 N. H. 271; Hunter v. Hook, 64 Barb. 469; Jones v. Savage, 6 Wend. 658; Gawtry v. Doane, 48 Barb. 148; U. S. Bank v. Southard, 2 Harr. 473; Barkalow v. Johnson, 1 Harr. 397; Bank U. S. v. Leathers,

Supreme Court that where an indorser of a note, on being informed that the maker had not paid it, observed that "he knew he had not to pay it; that it was the concern of himself (the indorser) alone; and that the maker had nothing to do with it," was an admission of liability, but that the plaintiff could not recover against him without proving that he was apprised of his laches in not making a regular demand of payment.[1]

Even where the party wrote a written acknowledgment, addressed to the plaintiff's counsel, stating "I hereby hold myself accountable for the payment of a note signed by J. Brown, payable to me, and indorsed by me, &c." it was held insufficient, no proof of knowledge of laches appearing.[2] And it is said and held that even if the drawer or indorser pass the amount of the bill or note, in ignorance that he has been discharged by laches, he may recover it back.[3]

§ 1150. There is certainly strong ground for contending that upon principles of estoppel, proof of a distinct promise to pay after maturity (no question of fraud or deceit arising)

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19 B. Mon. 64; Walker v. Rogers, 39 Ill. 279; Cheshire v. Taylor, 29 Iowa, 492; Sigerson v. Mathews, 20 How. 464; Davis v. Gowen, 387; Salisbury v. Renick, 44 Mo. 454; Otis v. Hussey, 3 N. H. 346; Newberry v. Trowbridge, 13 Mich. 264; Freeman v. O'Brien, 38 Iowa, 406; Arnold v. Dresser, 8 Allen, 435; Kelley v. Brown, 5 Gray, 108; Baer v. Leppert, 12 N. Y. S. C. (5 Hun), 453; 1 Parsons N. & B. 601; Story on Bills, § 320; Lilly v. Petteway, 73 N. C. 358; Williams v. Union Bank, 9 Heisk. 441 (1872) in which case it was held that it must appear that the party promising was under no misapprehension as to the law or the facts.

[1] Thornton v. Wynn, 12 Wheat. 183. "These declarations," said the Supreme Court, "amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder in not making a regular demand of payment of the note, by which he was discharged of his responsibility to pay it. The knowledge of this fact formed an indispensable part of the plaintiff's case, since without it, it cannot be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law."

[2] Farrington v. Brown, 7 N. H. 271.

[3] Story on Promissory Notes, § 361; Crutchers v. Wolf, 2 Mon. 88.

should in itself close all controversy as to demand, protest and notice. The drawer or indorser may not only waive the fact that demand, protest and notice were not duly made or given, they may also waive proof that they were made or given. And when he promises to pay the bill or note, such promise imports an unconditional assumption of it; and a dispensation with whatever preliminary evidences might be necessary to charge him with its payment. The holder is thereby advised that the party raises no question as to his liability, and to permit him when sued to require other proofs of what he has recognized, might enable him to practice a fraud by lulling the holder to quiet reliance on his promise, and then springing the defense upon him unawares. If there were a failure as to demand and notice, there might be excuses which the holder would come prepared to prove if the promise had not intimated that it was unnecessary. Or there might be witnesses whom he would have summoned, or testimony which he would have preserved, if not thus warned that the indorser acknowledged his liability. And good faith would seem to suggest that if the party deliberately promises to pay, he shall not afterward go behind that promise and deny facts which it presupposes, and is impliedly based upon.[1] Nevertheless it may be said *per contra*, that to consider the promise to pay as evidence *prima facie* of due demand and notice, or of knowledge of the want of the one or the other, and to throw the burden of proving want of diligence and ignorance thereof, with due circumspection taken to prevent surprise to the plaintiff, are all that is essential to protect him; and the authorities which adopt this equitable intermediate view are perhaps upon the whole best calculated to effectuate justice.[2]

§ 1151. In Virginia it was held, that where the drawer

[1] Debuys v. Mollere, 15 Mart. (La.) 318, Mathews, J., saying: "The indorser must have known whether he was duly notified of the protest. If he were not, by promising to pay he waived the advantage which such negligence would otherwise have given; if he did not receive regular notice he is liable under his subsequent promise." See Bogart v. M'Clurg, 11 Heisk. 105.

[2] See *post*, § 1152 *et seq.*

of a protested bill, who was sued, called for proof of notice, and it was proved that when he was applied to for payment he acknowledged that the debt was a just one, and said he would pay it, it was a waiver of all notice, though nothing was said about notice in the acknowledgment; and that instructions that, "unless the said acknowledgment was made with a knowledge of all the facts of the case as to the laches of the holders of the said bill, the said evidence was not to be received," were properly refused by the court below.[1] And in a subsequent case the doctrine was reiterated.[2] It will be observed, that in neither of these cases was there any proof of any laches; but the doctrine which they recognize is, that such proof is absolutely precluded by the waiver.

SECTION II.

PROMISE TO PAY AS PRESUMPTIVE EVIDENCE OF KNOWLEDGE OF LACHES.

§ 1152. When it is conceded or proved that there were laches in respect to the demand, protest or notice, the promise to pay after maturity should be regarded as *prima facie* evidence that the party making it knew of such laches, wherever such knowledge is deemed necessary to constitute a waiver. It is a promise against interest. The drawer or in-

[1] Walker v. Laverty, 6 Munf. 487 (1820). No authorities quoted.

[2] Pate v. McClure, 4 Rand. 169 (1826), Carr, J., saying: "Alexander McClure says, in direct response to a particular interfogatory in the bill, that immediately on the return of the bills he gave due notice of the protest, both to Lynham and Pate; and this is strongly corroborated by the correspondence. But in truth, the case is taken wholly off that ground by the various subsequent promises to pay and acts of sanction and ratification given and done by Pate—promises and acts covering an interval of twelve years, and done in the most solemn manner with full knowledge of the facts." [The court evidently does not mean knowledge of any laches, which it thought had not been committed, but knowledge of non-payment.] "After this," continues the judge, "it is equally repugnant to reason and to law, that he should claim to be discharged for want of notice, and call on the other party to prove that he proceeded in strict conformity with all the niceties of the law merchant. If he had intended to place himself on this ground, the time was when the bills came back and he was pressed for payment of them. He should then have said, 'Show that in all things you have proceeded strictly; that the bills have been regularly protested, and due notice of protest given to me.' Nor will it avail him to say that he was ignorant of the law; every man is bound to know the law."

dorser should know when the instrument to which he was a party fell due. His promise to pay presupposes it to be overdue and unpaid. And if he has not received notice, he has every reason to suppose that it was not sent, and that the steps which should precede it were not taken.[1] If he received notice of due dishonor, and nevertheless demand and protest were not duly made, it might be otherwise. As a general rule, however, the American decisions require separate proof of knowledge in all cases.[2] And it has been held that a promise to pay, with knowledge that no notice was given, would not be a waiver unless there was also knowledge that due demand was not made.[3]

§ 1153. The inference is not so strong as to knowledge of laches respecting the presentment, as to the notice, but still strong enough, we think, to bear out the views expressed. Where there has been due presentment, and a promise to pay afterward resisted on the ground of no notice, the presumption that it was given, or that if not given the promisor knew the fact, would be very strong.[4] Where it is alleged that there was neither presentment nor notice, the promise to pay would still lead, we think (for the reasons already given), to the same conclusions,[5] though respecting the presentment,

[1] "The weight of authority," says Chancellor Kent, "is that this knowledge may be inferred as a fact from the promise under the attending circumstances, without requiring clear and affirmative proof of the knowledge." 3 Comm. lect. 44. In Thomson on Bills (Wilson's ed.), p. 381, it is said, "There must be proof of knowledge of the failure;" and p. 384, "Though it should not be proved, it will be presumed that he knew of the failure." Chitty on Bills (13th Am. ed.) [*504–5], 570; 1 Parsons N. & B. 603; Hopley v. Dufresne, 15 East, 275 (1812); Taylor v. Jones, 1 Camp. 105; Turnbull v. Hill (Scotch case), Thom. 381; Barkalow v. Johnson, 1 Harr. 397, Hornblower, C. J., saying: "The indorser knew indeed whether he had or had not received a notice of demand and non-payment." Landrum v. Trowbridge, 2 Metc. (Ky.) 283; Loose v. Loose, 36 Penn. St. 538; Nash v. Harrington, 1 Aik. 39; Debuys v. Mollere, 15 Mart. (La.) 318: *ante*, § 1150, note 1.

[2] See *ante*, § 1149, note 6; Ford v. Dallam, 3 Cold. 67; Trimble v. Thorn, 16 Johns. 152 (overruled by Tebbetts v. Dowd, 23 Wend. 379); New Orleans Bank v. Harper, 12 Rob. (La.) 231; Lilly v. Petteway, 73 N. C. 358.

[3] Low v. Howard, 11 Cush. 268.

[4] Ladd v. Kenney, 2 N. H. 340; Chitty on Bills (13th Am. ed.) [*504–5], 570.

[5] Croxen v. Worthen, 5 M. & W. 5. An action against maker of a note pay-

high authority, which recognized the inference respecting notice, has thought differently.[1]

§ 1154. A distinction may well be taken between the effect of a promise to pay, in regard to the inference of notice, in cases of non-payment and non-acceptance, where a bill has been presented for acceptance before it becomes due. In the former case (non-payment), the party is supposed to have known when the bill became due, and must actually know, or might readily have ascertained, whether or not there had been laches; and, therefore, the inference arises from a promise to pay, of a regular presentment for payment and of due notice. But in the latter case (when the bill was dishonored for non-acceptance), the fact of a bill having been presented for acceptance before it fell due, and dishonored, lies peculiarly in the knowledge of the party presenting it; and there is no inference that a party who promises to pay after the bill falls due, would have known of the refusal to accept, or of the neglect to give notice of such non-acceptance. Therefore, in such cases, the promise to pay would not be in itself a waiver of laches, nor presumptive evidence of diligence.[2] This doctrine is held in England as well as in the United States.[3]

§ 1155. When proof of knowledge, apart from any presumption which the promise to pay may give rise to, is re-

able at a specified place. There was no evidence of presentment there, which was charged in the declaration, but the defendant had promised to pay by installments. Alderson, B., said: "The defendant is supposed to know the law; he knows, therefore, that he is not liable unless the note has been duly presented. With that knowledge he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented?"

[1] Thornton v. Wynn, 12 Wheat. 183, Washington, J., saying: "That due notice was not given to the defendant, he could not fail to know; but a regular demand of the maker of the note could not be inferred from the admissions of the defendant."

[2] Landrum v. Trowbridge, 2 Mete. (Ky.) 283; Bank of Tennessee v. Smith, 9 B. Mon. 609; Phillips v. McCurdy, 1 Har. & J. 187.

[3] Blessard v. Hurst, 5 Burr. 2670 (1770). The promise to pay was made without knowledge that the holder had presented for acceptance, and not given notice of refusal till after payment had been likewise refused. Goodall v. Dolley, 1 T. R. 712.

quired, all the circumstances may be looked at, and it may be made out inferentially by the relations, acts and expressions of the parties, and the time which had elapsed after maturity when it was made.[1] Where the indorser applied for an extension of time after suit brought in which due presentment was alleged, it was thought sufficient evidence to go before a jury of knowledge.[2] Where the drawer, knowing that notice had not been sent, himself took the bill and demanded it of the drawee some time after it was due, it was inferred that he must have known the failure in making a previous demand.[3]

SECTION III.

PROMISE TO PAY AS EVIDENCE OF DILIGENCE, OR WAIVER OF PROOF OF NEGLIGENCE.

§ 1156. We have already seen the double aspect in which a promise to pay after maturity may appear; and that when relied on as a waiver of laches, knowledge of such laches by the promisor must accompany it. But when no laches are proved or conceded, it assumes another aspect. Instead of proving demand and notice, the holder proves an acknowledgment of liability, and a promise to discharge it—a liability presupposing and based upon demand and notice, or dispensation with them. It is, therefore, presumptive evidence that demand was duly made and notice duly given, and sufficient in itself to the plaintiff's recovery, unless it be rebutted.[4]

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[1] Martin v. Winslow, 2 Mason, 241; Givens v. Merchants' Nat. Bank, 85 Ill. 444.

[2] Hopley v. Dufresne, 15 East, 275. [3] Cram v. Sherburne, 14 Me. 48.

[4] Tebbetts v. Dowd, 23 Wend. 379; Lewis v. Brehme, 33 Md. 412; Hazard v. White, 26 Ark. 280; Dickerson v. Turner, 12 Ind. 223; Edwards on Bills, 652.

The objection has been urged that a promise to pay, when made by parol, is within the statute of frauds, being a promise to pay the debt of another. The liabilities of drawers and indorsers are governed by the law merchant, and are not, as we think, at all affected by the statute of frauds. See *ante*, § 567, note 5.

§ 1157. A failure to discriminate between the promise to pay as a waiver of demand and notice, and as a waiver of proof of demand and notice, has led to much confusion in the adjudicated cases.

There is certainly great force in the view that a distinct promise to pay, made after maturity, ought to be regarded either as conclusive evidence that there was due demand and notice, which the promisor is estopped to rebut, or as an absolute waiver of all proof to that effect.[1] But a majority of the cases consider it *prima facie* evidence of demand and notice merely, and open to rebuttal; and that if the defendant does rebut it, with proof of laches, the plaintiff must rejoin with proof that the defendant had knowledge of the laches, his position being shifted from a reliance on his own diligence, to proof that his negligence was waived. This view has been illustrated with great power in New York (in Tebbetts v. Dowd), and is adopted in other cases,[2] and is, upon the whole, as it seems, the best calculated to effectually protect the interests of all parties.

It has been held that even where the promise to pay was in writing, it is only *prima facie* evidence, and open to rebuttal.[3]

§ 1158. In England, there is no doubt that an acknowledgment of liability or a promise to pay by the drawer or indorser after maturity is sufficient evidence of due demand, protest and notice. Thus, where the drawer said when demand was made that he would be glad to pay as soon as his accounts with his agents were cleared, Lord Ellenborough said: "By the promise to pay he admits his liability; he ad-

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And it seems to us that there is nothing in this objection. In an action on the promise to pay, it was sustained, however, in Peabody v. Harvey, 4 Conn. 119. But in an action on the note, it was decided to be unavailing, in U. S. Bank v. Southard, 2 Harr. 473.

[1] See *ante*, § 1150; Byles on Bills (Sharswood's ed.) [*291], 450.

[2] Tebbetts v. Dowd, 23 Wend. 379; Loose v. Loose, 36 Penn. St. 588; Nash v. Harrington, 1 Aik. 39; Bruce v. Lytle, 13 Barb. 163; Dorsey v. Watson, 14 Mo. 59; Thompson on Bills (Wilson's ed.) 383, 384.

[3] Commercial Bank v. Clark, 28 Vt. 325.

mits the existence of everything which is necessary to render him liable. When called upon for payment of the bill he ought to have objected that there was no protest. I must therefore presume that he had due notice, and that a protest was regularly drawn up by a notary."[1] And demand, protest or notice have been presumed where the indorser promised a subsequent indorser to pay;[2] where the indorser said "he had not regular notice, but as the debt was justly due he would pay it;"[3] where the drawer and indorser wrote a letter promising a payment;[4] where the drawer entered into an agreement to pay the bill by installments.[5] And it has been held that an offer on the part of an indorser to compromise by paying one half of a bill of exchange, or securing the payment of it, dispensed with proof of notice, there being no evidence on the subject of notice.[6] But this seems to go too far, and is dissented from by high authority;[7] and an offer to pay costs and the residue on time has been held insufficient to dispense with proof of notice, Lord Denman, C. J., saying: "The defendant might, if time had been given him, have been willing to have waived any objection with respect to the notice of dishonor."[8] But the English decisions are not at all clear or reconcilable. In one case, where the drawer had written a letter promising to see the bill arranged, and had also promised to give a judgment for the amount, but swore that he knew nothing of the dishonor until a fortnight after maturity, the judge told the jury that they must arrive at the conclusion that notice was given the day of maturity, but if they believed the defendant they

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[1] Gibbon v. Coggen, 2 Camp. 188; Taylor v. Jones, 2 Camp. 105; Stevens v. Lynch, 2 Camp. 332; 12 East, 38; Hopes v. Alder, 6 East, 16; Croxen v. Worthen, 5 M. & W. 5.

[2] Potter v. Rayworth, 13 East, 417.

[3] Lundie v. Robertson, 7 East, 231.

[4] Wood v. Brown, 1 Stark. 217; Campbell v. Webster, 2 C. B. 258.

[5] Gunson v. Metz, 1 Barn. & Cres. 193.

[6] Dixon v. Elliott, 5 Car. & P. 437; see Edwards on Bills, 652, 653, note; Metcalf v. Richardson, 73 E. C. L. R. 1070.

[7] Phillips on Evidence, vol. 2, p. 24; Chitty Jr. on Bills, 1619, note *a*.

[8] Standage v. Creighton, 5 Car. & P. 406.

must find for him. A verdict for the plaintiff was sustained.[1] In another case a verdict for the defendant was directed, although he had used language which the court thought equivalent to a promise to pay.[2]

But where it appears that there were laches in respect to demand, protest or notice, and that the drawer or indorser could not from his situation have known the fact, or was really ignorant of it, the holder cannot recover.[3] Thus, where the day after a bill was dishonored in London, and before the fact of its dishonor could be known in Yorkshire, the drawer's clerk called in Yorkshire upon the indorser prior to the holder, and a conversation took place as to the bill being likely to come back, and the clerk said: "I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday I will pay the money;" and the indorser did not receive either the bill or notice until some days after the Tuesday, and notice of dishonor was not given to the drawer in due time; it was held that such promise was not sufficient to dispense with due notice of dishonor to the drawer.[4]

§ 1159. There are other circumstances which operate as presumptive evidence of due demand, protest and notice. Thus a written admission of notice would waive the necessity of proof, but it might be explained away by showing that it was made under mistake, and that the holder was duly warned not to rely on it.[5] So an agreement by the indorser with the maker to take back the note and return the property for which it was given, is evidence from which a jury might infer demand and notice; and it would also operate as a waiver if there were laches.[6] So the insertion

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[1] Jones v. O'Brien, 26 E. L. & Eq. 283.

[2] Chapman v. Annett, 1 Car. & K. 552.

[3] Blesard v. Hirst, 5 Burr. 2670; Pickin v. Graham, 1 Cromp. & Mees. 725; Stevens v. Lynch, 2 Camp. 332; Chitty on Bills (13th Am. ed.) [*504], 570.

[4] Pickin v. Graham, *supra*. See Yeager v. Falwell, 13 Wall. 12.

[5] Commercial Bank of Albany v. Clark, 28 Vt. 325.

[6] Andrews v. Boyd, 3 Metc. 434.

of a bill in a schedule of liabilities by an insolvent,[1] or the recognition by an indorser of an account with a request that the bill be charged separately[2] would afford presumptive evidence of demand and notice.

§ 1160. The courts have gone so far in admitting circumstances to go to the jury as evidence of demand and notice, that Professor Parsons very justly observes:[3] "Some of the cases have almost gone so far that the only safe course for an indorser or drawer, when payment is demanded of him, would be expressly to deny both presentment and notice. Thus, for instance, a verdict against the drawer of a bill was sustained where the only evidence of notice was, that the defendant, two days after maturity, sent a person to the plaintiff to say that he had been defrauded of the bill, and should defend any action upon it."[4] So objecting to payment upon any other grounds than laches in respect to presentment and notice;[5] and so failure to produce a letter containing, as alleged, notice of dishonor, and the production of which was called for.[6] So an answer by the drawer on being informed of non-payment by the acceptor that he would see the acceptor about it.[7]

§ 1161. In Massachusetts, it has been held that if the indorser promises to pay, without knowledge of material facts affecting his liability, as for instance, that, an agreement had been made by the holder by which he was discharged, he will not be bound, although he knew of the laches respecting demand and notice.[8] This view depends upon the principles which regulate the liabilities of all sureties, and is sustainable without reference to the peculiar doctrines respecting demand and notice. And it concurs with the English doctrine on the subject.[9]

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[1] Hyde v. Stone, 20 How. 170; see *contra*, Jones v. Savage, 6 Wend. 658.

[2] Bank U. S. v. Lyman, 20 Vt. 666.

[3] 1 Parsons N. & B. 616.

[4] Wilkins v. Jadis, 1 Moody & R. 41.

[5] Curlewis v. Corfield, 1 Q. B. 814; 1 Gale & D. 489.

[6] Roberts v. Bradshaw, 1 Stark, 28.

[7] Metcalfe v. Richardson, 73 E. C. L. R. 1010; Edwards on Bills, 652, 653.

[8] Low v. Howard, 10 Cush. 159.

[9] Stevens v. Lynch, 12 East, 38; 2 Camp. 332; see Story on Bills, § 320.

SECTION IV.

WHAT AMOUNTS TO AN ACKNOWLEDGMENT OR PROMISE TO PAY.

§ 1162. The burden of proof is upon the plaintiff to show clearly and distinctly the acknowledgment of liability and promise to pay the bill or note.[1] But it matters not what particular phrase may be used, so that it amounts to such acknowledgment or promise. Where the indorser of a note said to the plaintiff's agent, who called on him and inquired what he was going to do, "that in a few days he would see the agent and arrange it," the United States Supreme Court said: "This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period."[2]

So where the drawer said he would see the bill paid;[3] and where the drawer said, on being informed of the dishonor of the bill, "it must be paid;"[4] but where an indorser, on being asked what would be done with the note, replied that "it will be paid," it was thought that "from the general tenor of his conversation, it could not be inferred that it was his intention, knowing of his discharge, to waive his defense, and promise to pay the note, or see it paid at all events," and that it might have been "a mere assertion of his expectation that it would be paid by the promisor."[5]

So it was considered sufficient where the drawer promised to pay when it was in his power;[6] and where the indorser said he would pay as soon as he could, but he doubted when that would be;[7] so a promise to pay in a few days with a request for delay;[8] a promise to arrange with the drawee so that the draft should be paid;[9] a promise to pay if the note could not be collected of the maker by suit;[10] an

[1] Creamer v. Perry, 17 Pick. 332.
[2] Sigerson v. Mathews, 20 How. 496.
[3] Hopes v. Alder, 6 East, 16.
[4] Rogers v. Stephens, 2 T. R. 713.
[5] Creamer v. Perry, 17 Pick. 332.
[6] Donaldson v. Means, 4 Dall. 109.
[7] Rogers v. Hackett, 1 Fost. 100.
[8] Hopkins v. Liswell, 12 Mass. 52.
[9] Bryam v. Hunter, 36 Me. 207.
[10] Lane v. Stewart, 20 Me. 98.

acknowledgment by the drawer, with a promise to send funds with which to take up the bill;[1] a promise by the indorser that he would set the matter to rights when he returned;[2] a promise to pay in a few months;[3] or by installments on short time.[4]

§ 1163. *There must be an absolute promise to operate a waiver of laches.*—If the remark of the party do not amount to a promise, or is a conditional promise unaccepted, it will not suffice as a waiver of absence of due demand or notice.

Thus, where the indorser said, on being arrested, it was true the note had his name on it, but he had security, though he wished for time to pay it, it was held insufficient. So where he said he would rather pay the note than be sued;[5] or if I am bound to pay it, I will;[6] or that he would see what he could do, and endeavor to provide effects;[7] or where the indorser remarked to a third party talking generally, that he would take care of the bill, or see it paid;[8] so a reply that the indorser knew of no defense is not a promise;[9] nor is any equivocal answer.[10]

"The promise must be unequivocal, and amount to an admission of the right of the holder; or the act done must be of a nature clearly importing a like admission of the right. If it be defective in either respect, or if it be a conditional offer of payment unaccepted, then, and in such a case, the holder has no right to insist upon it as a waiver. So if the promise be qualified, it must be received with its qualification, and cannot be insisted upon as an absolute waiver."[11]

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[1] Read v. Wilkinson, 2 Wash. C. C. 514.

[2] Anson v. Bailey, Boll, N. P. 276.

[3] Hart v. Long, 1 Rob. (La.) 83.

[4] Union Bank v. Grimshaw, 15 La. 321; Croxen v. Worthen, 5 M. & W. 5.

[5] Keyes v. Fenstermaker, 24 Cal. 329.

[6] Dennis v. Morrice, 3 Esp. 158.

[7] Prideaux v. Collier, 2 Stark. 57.

[8] Miller v. Hackley, 5 Johns. 375.

[9] Griffin v. Goff, 12 Johns. 423.

[10] Borradaile v. Lowe, 4 Taunt. 93; Sherrod v. Rhodes, 5 Ala. 683.

[11] Story on Bills, § 321; Crain v. Colwell, 8 Johns. 384; Kennon v. McRea, 7 Port. (Ala.) 175; Tardy v. Boyd, 26 Grat. 637. Christian, J.: "If the conduct or acts of the indorser be equivocal, or the language used be of a qualified or uncertain nature, the indorsee will not be held responsible."

If the promise is conditional, the acceptance of it must be proved in order to make it binding. And where it appeared that the indorser offered to give his own note, which was not accepted, it was held no waiver.[1] So an offer to pay part cash and give his note for the balance;[2] or to procure a renewal;[3] or to pay in depreciated bank bills,[4] or in Confederate States currency.[5]

§ 1164. But qualified or conditional promises to pay, taken in connection with other circumstances, have been held presumptive evidence that due demand was made and notice given.[6] Edwards says[7] of such a promise: "As an admission, it is evidence for the jury like any other conversation; if the liability of the drawer or indorser be conceded by him, the concession is quite as good evidence of demand and notice as a promise to pay; for, as we have said, the promise to pay is deemed an admission of liability—an admission that the bill or note has been presented in time, and that due notice of non-payment has been given. And there is no reason why the same admission may not be made by a negotiation for time, or by any other act or language that acknowledges the obligation to pay the note or bill." In Tennessee it is held that if the indorser knew he was discharged by want of notice, either an admission of liability or promise to pay would bind him.[8]

SECTION V.

WAIVER BY PART PAYMENT AFTER MATURITY.

§ 1165. In the *second* place: the part payment of a bill or note after its maturity, by the drawer or indorser, is an acknowledgment of liability, and therefore alone and

[1] Sice v. Cunningham, 1 Cow. 397; Agan v. McManus, 11 Johns. 180.
[2] Barkalow v. Johnson, 1 Harr. 397; but see Dixon v. Elliott, 5 Car. & P. 437.
[3] Laporte v. Landry, 17 Mart. (La.) 359.
[4] Newberry v. Trowbridge, 13 Mich. 637.
[5] Tardy v. Boyd, 26 Grat. 637.
[6] Dixon v. Elliott, 5 Car. & P. 437.
[7] Edwards on Bills, 655.
[8] Bogart v. McClurg, 11 Heisk. 614.

unexplained is presumptive evidence that the liability was duly fixed according to law.[1] And if it be shown that such part payment was made with knowledge of laches of the holder in respect to demand, protest or notice, it is settled that it constitutes a waiver of such laches, and binds the party making it absolutely.[2] And it is held, in some cases, that a part payment is a distinct concession of liability, and that whenever the drawer acknowledges himself to be liable to payment, the necessity of proving demand and notice is dispensed with, because such acknowledgment carries with it internal evidence that the drawer knew that due diligence had been used by the holder, or even if it had not, that still the drawer confessed that he was under an obligation to pay.[3] But it has been held that part payment will not operate as a waiver unless the indorser knew of the insufficiency of the demand or notice.[4]

§ 1166. It seems to us that part payment after maturity stands upon precisely the same footing as a promise to pay. It is simply the executed act, while the promise is executory. Therefore it is *prima facie* evidence that the party was duly charged by demand and notice. If he shows that he was not so charged, it is still *prima facie* evidence that he knew of the holder's laches. But when he shows in rebuttal that he paid the part supposing there was no laches, and that in fact there was, it becomes unavailing, being paid under a mistake of fact, and may be recovered back, negligence not impairing the right of recovery.[5]

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[1] Vaughn v. Fuller, 2 Stra. 1246. Lee, C. J., said that part payment by the indorser made proof of demand upon the maker unnecessary. Holford v. Wilson, 1 Taunt. 12, held that part payment warranted the jury in presuming that due notice had been given the drawer. Whitaker v. Morrison, 1 Fla. 25, *held* waiver of notice; Chitty on Bills [*500], 564, 565.

[2] Sherer v. Easton Bank, 33 Penn. St. 134; Williams v. Robinson, 13 La. 419; Harvey v. Troupe, 23 Miss. 538.

[3] Levy v. Peters, 9 Serg. & R. 125, Tilghman, C. J.; Curtiss v. Martin, 20 Ill. 557; Bank U. S. v. Lyman, 20 Vt. 666; Read v. Wilkinson, 2 Wash. C. C. 514; Bibb v. Peyton, 12 Sm. & M. 275; Lane v. Steward, 20 Me. 98; see Whitaker v. Morrison, 1 Fla. 25; 1 Parsons N. & B. 608, 609; see Story on Bills, § 320.

[4] Newberry v. Trowbridge, 13 Mich. 264.

[5] See as to negligence not affecting the right to recover money paid under

§ 1167. An offer to pay a part of the bill or note, without any objection made as to demand and notice, has been held sufficient to dispense with proof of demand and notice;[1] but it has been held otherwise where the drawer, on being arrested, offered as a compromise to give his bill at two months,[2] and where the plaintiff's attorney offered to pay a part cash and secure the residue;[3] and such offers when refused seem to signify nothing but tenders of compromise, and not to be alone either acknowledgments of due demand and notice, or waivers of laches.

§ 1168. Where the promise is only as to part of the sum, it is only a waiver *pro tanto*. Thus where the drawer of a bill for £200, who had not received notice, said: "I do not mean to insist on want of notice, but I am only bound to pay you £70," Abbott, C. J., said: "The defendant does not say that he will pay the bill, but that he is only bound to pay £70. I think the plaintiff must be satisfied with the £70."[4]

If the part payment were made by the indorser as agent of the maker, or were otherwise explained, it would not operate as a waiver.[5] Story considers that part payment is ordinarily a sufficient excuse for the omission of notice, because it evinces that the party so paying could not have sued on the note on payment thereof, and is in fact the true party for whose benefit the note was made.[6]

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mistake, National Bank of Commerce v. National M. B. Ass'n, 55 N. Y. 211; Lawrence v. American Nat'l Bank, 54 N. Y. 435; *post*, § 1220.

[1] Dixon v. Elliott, 5 Car. & P. 437; Margetson v. Aitken, 3 Car. & P. 388; Harvey v. Troupe, 23 Miss. 538; Smith, C. J., said: "A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he has been released from liability on the bill by the neglect of the holder, will operate as a waiver, and bind the party who makes it for the payment of the whole bill."

[2] Cuming v. French, 2 Camp. 106.

[3] Standage v. Creighton, 5 Car. & P. 406.

[4] Fletcher v. Froggatt, 2 Car. & P. 569 (12 E. C. L. R.)

[5] Whitaker v. Morrison, 1 Fla. 25.

[6] Story on Notes, § 359.

CHAPTER XXXVI.

CIRCUMSTANCES WHICH WILL NOT EXCUSE FAILURE TO MAKE PRESENTMENT OR PROTEST, OR GIVE NOTICE.

§ 1169. Circumstances not infrequently arise under which the making presentment of the bill or note, or giving notice of its dishonor, would seem to be a useless formality, or a peculiarly onerous task, and which, on these accounts have been often urged as excuses for failure to make such presentment, or give such notice; but they are of a character which the law does not recognize as sufficient to exonerate the holder from taking the usual steps in order to charge an indorser. They may be classified as follows:

(1) The want of injury to the party.

(2) The bankruptcy or insolvency of the acceptor or maker.

(3) The loss or mislaying of the bill or note.

(4) The appointment of drawer or indorser as executor or administrator.

(5) The transfer of the bill or note as collateral security.

(6) The death of the maker or acceptor.

(7) The misdating of a bill or note by a foreign resident.

SECTION I.

THE WANT OF INJURY TO THE PARTY.

§ 1170. In the *first* place, the want of prejudice or injury to the drawer or indorser is never a sufficient excuse for default in making presentment or protest, or giving notice of dishonor.[1] In some of the early cases, and indeed in some

[1] Chitty on Bills (13th Am. ed.) [*435, 436], 490; 1 Parsons N. & B. 551, 630; Foster v. Parker, Law R. C. P. Div. 19 (1876), Lindley, J., "He (the indorser)

modern cases, and treatises also, the holder is said to be excused for his failure in making presentment and giving notice, when there are no funds in the drawee's hands, on the ground that there could be no prejudice or injury to the drawer or indorser,[1] and at one time the question of injury seems to have been the criterion whether or not presentment or notice was excused.[2] The reports exhibit frequent expressions of regret that the strict rule requiring presentment and notice has been even so far relaxed as to admit the exception arising from the want of funds;[3] and it is now perfectly well settled that the question of injury does not enter at all into the consideration. The law requires presentment and notice as conditions precedent to the fixed liability of the drawer and indorser, not merely as an indemnity against actual injury, but as security against a possible injury, which might result from the holder's laches.[4] It is true, that when the drawer has no funds in the drawee's hands, he can, as a general rule, suffer no injury from want of presentment or notice; but drawing in such a case would be a fraud, and it is for that reason, rather than the absence of actual injury, that presentment and notice are excused.[5] Where it was endeavored to show excuse for want of notice by showing want of injury, Lord Kenyon said: "I cannot hold the law to be so. The only case in which

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would be damnified in the legal sense if he had a remedy over against any of them (prior parties), and was not bound, as between himself and them, to meet the bill."

[1] Cory v. Scott, 3 B. & Ald. 519; Mechanics' Bank v. Griswold, 7 Wend. 165; Commercial Bank v. Hughes, 17 Wend. 94; Edwards on Bills, 446, 636; Story on Bills, § 280.

[2] Meggadow v. Holt, 12 Mod. 15 (1691); Mogadara v. Holt, 1 Show. 317; Chitty, Jr., on Bills, 57, 182.

[3] *Ex parte* Heath, 2 Ves. & B. 240; Clegg v. Cotton, 3 Bos. & P. 239; Carter v. Flower, 16 M. & W. 743.

[4] Hill v. Martin, 12 Mart. (La.) 177, Porter, J., said: "The plaintiff read from Chitty, p. 151, to show that when the indorser was not injured by want of notice, the laches to give it was cured. The rule is stated in a note to the edition of 1809, but it is not law." French v. Bank of Columbia, 4 Cranch, 141, Marshall, C. J.; May v. Coffin, 4 Mass. 341; Nash v. Harrington, 2 Aikens, 9; Hill v. Heap, Dow. & R. 15; Bickerdike v. Bollman, 1 T. R. 405; Edwards on Bills, 636; Story on Bills, § 306.

[5] *Ante*, Chapter XXXI, Sec. I.

notice is dispensed with, is where there are no effects of the drawer in the drawee's hands. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether in fact the drawer did receive a prejudice from the want of notice or not."[1]

SECTION II.

THE BANKRUPTCY OR INSOLVENCY OF THE ACCEPTOR OR MAKER.

§ 1171. In the *second* place, the bankruptcy and insolvency of the drawee of a bill, however well known, constitute no excuse for neglect to make due presentment thereof for acceptance,[2] or to give due notice of its dishonor[3] to the drawer and indorsers if it is not accepted. And the same rule applies as to the necessity of presentment for payment to the acceptor of a bill or maker of a note,[4] and as to notice of its dishonor by non-payment.[5] This doctrine rests upon the twofold ground that it is a part of the contract of drawer and indorser that the bill or note should be presented for acceptance or payment, as the case may be, and due notice given if it be dishonored; and further, that it cannot be definitely settled without a presentment that the instrument will be dishonored, as through friends or resources unknown to others, the principal party may derive the means for payment.

§ 1172. The English and American cases are now uniform on this subject,[6] and it was long ago said: "It sounds

[1] Dennis v. Morris, 3 Esp. 158. [2] Chitty on Bills (13th Am. ed.) [*330], 369.

[3] Chitty (13th Am. ed.) [*330], 369.

[4] Chitty [*354], 396; Story on Notes, § 286; Story on Bills, §§ 318, 326, 346; 1 Parsons N. & B. 446.

[5] Story on Notes, § 367; 1 Parsons N. & B. 528.

[6] Nicholson v. Gouthit, 2 H. Bl. 609; Bowes v. Howe, 5 Taunt. 30; Warrington v. Furbor, 8 East, 242; Esdaile v. Sowerby, 11 East, 114; Thackeray v. Blackett, 3 Camp. 164; Smith v. Becket, 13 East, 187; Cory v. Scott, 3 B. & Ald. 619; Leach v. Hewitt, 4 Taunt. 731; Free v. Hawkins, 8 Taunt. 92; Russell v. Langstaffe, Doug. 496; Armstrong v. Thurston, 11 Md. 148; May v. Coffin,

harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with,"[1] though at one time a different view obtained.[2]

The same rule applies where the insolvency arises between drawing or indorsing and maturity;[3] and where the insolvency is known to the party at the very time when he signs his name,[4] expectation or knowledge of the drawer or indorser

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4 Mass. 341; Clair v. Barr, 2 Marsh. 255; Benedict v. Caffee, 5 Duer, 226; Watkins v. Crouch, 5 Leigh, 522; Hunt v. Wadleigh, 26 Me. 271; Barton v. Baker, 1 S. & R. 334; Hightower v. Ivy, 2 Port. (Ala.) 308; Denny v. Palmer, 5 Ired. 610; Nash v. Harrington, 2 Aik. 9. The maker was insolvent and in prison. See Chitty on Bills [*438]; Bank of Seaford v. Connoway, 4 Houston, 206. But *contra*, Bogy v. Keil, 1 Mo. 743; Strothart v. Parker, 1 Overton, 260.

[1] Nicholson v. Gouthit, 2 H. Bl. 609; Chitty [*449].

[2] De Berdt v. Atkinson, 2 H. Bl. 336. In Jackson v. Richards, 2 Caines, 343, Kent, C. J., said: "Within two years subsequent to the decision (in De Berdt v. Atkinson) the same court decided directly the contrary in the case of Nicholson v. Gouthit. I think the reasoning in the last decision the best, and ought to be followed."

[3] Crossen v. Hutchinson, 9 Mass. 205.

[4] In Brown v. Ferguson, 4 Leigh, 53, it was said by Tucker, P.: "It has been long since settled that notice, or rather knowledge, by anticipation will not dispense with the necessity of notice of non-payment. Even the known insolvency of the drawee will not have that effect; for as many means of securing payment may exist through the assistance of friends, or otherwise, it is reasonable that the drawer or indorsers shall have notice that the holder designs to look to them, in order that they may have the opportunity of availing themselves of such means. Knowledge of the fact of insolvency, or that a bill will be dishonored, is one thing, and notice of protest for non-payment is another. For, until the drawer or indorser receives such notice, he has no reason to conclude that resort will be had to him. He is lulled into security, instead of being awakened to the necessity of providing for his own indemnity." In the same case (4 Leigh, 49), Carr, J., said: "Upon the reason and justice of the case, I at first felt doubts whether the drawer was entitled to strict commercial notice. There is no doubt that he was authorized to draw the bill, for the jury find that the drawees owed him the sum for which it was drawn. This, under the general rule, would entitle the drawer to notice. But it is also found that, before the bill was presented for acceptance, the drawees having been advised of it, wrote a letter to the drawer on the subject, in answer to which letter he (the drawer) writes: 'I am sorry you will be unable to retire the draft. When the draft is nearly due, you can draw on me at sixty days, to enable you to take it up.' It is found also that when the time for paying the bill drew near, the drawees did draw on Ferguson (the drawer) for the purpose of meeting it; that this bill was sold on condition that Ferguson should accept it, and was sent on and presented to him and dishonored by him. These facts seemed to me to show clearly that Ferguson (the

that the bill or note will not be paid are not excuses, for knowledge is not notice.[1]

The bankruptcy and insolvency of the drawer or indorser is no excuse for want of notice to him, it should be given to his assignee.[2]

SECTION III.

THE LOSS OR MISLAYING OF THE BILL OR NOTE.

§ 1173. *In the third place.*—The loss or mislaying or destruction of a bill or note payable on a day certain, so that, at its maturity, the holder is not able to deliver it up to the acceptor or maker, upon its being paid, is, as a general rule, no excuse for want of a demand of payment of acceptor or maker, or of due notice to drawer or indorser.[3] Due demand should be made, accompanied by a tender of indemnity to maker or acceptor, and then should he refuse, due protest

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drawer) had, if not a perfect knowledge, the strongest grounds to conclude that Foster and Moore (the drawees) would not pay the bill he had drawn on them, and therefore was not entitled to strict notice. An examination of the subject, however, has satisfied me that my first impressions are in opposition to the fixed and settled law of the subject. Nicholson v. Gouthit, 2 H. Bl. 609, is the leading case on the point, which has been since uniformly followed. In Esdaile v. Sowerby, 11 East, 117, the indorser of a bill had full knowledge of the bankruptcy of the drawer, and the insolvency of the acceptor, before and at the time when the bill became due; yet the court held that this did not dispense with the necessity of giving such indorser regular notice of the dishonor of the bill. The case of Staples v. O'Kines, 1 Esp. R. 332, seems directly in point to the present case. In an action against the drawer of a bill, the defense was want of notice; the plaintiff called the acceptor, who proved that, when the bill was drawn, he was indebted to the defendant in more than the amount, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was therefore then understood between them that the drawer should provide for it; and it was contended that this superseded the necessity of giving the drawer notice, but Lord Kenyon held that it did not, and nonsuited the plaintiff. There are many more cases to the same point. The authority of these adjudications, and the reason on which they are founded, satisfy me that the drawer, in the case before us, was entitled to regular notice of the non-payment of the bill." Farnum v. Fowle, 12 Mass. 89; Sandford v. Dillaway, 10 Mass. 52; Allwood v. Hasledon, 2 Bail. 457.

[1] Cases *ante*, p. 188, note 4.

[2] *Ex parte* Johnson, 1 Mont. & A. 622.

[3] Story on Notes, 290; Story on Bills, § 348.

should be made (where requisite) and due notice given. But the acceptor or maker is not bound under such circumstances to pay the amount due by the bill or note, if lost or mislaid, although he may at his election do so; for he is entitled in all cases to have the bill or note delivered up to him as a voucher upon payment thereof.[1] The proper remedy for the holder in case of a refusal to pay is in equity.[2] If the instrument be destroyed however, he may recover at law, and there are some other exceptional circumstances, under which he may do so elsewhere considered.[3]

In respect to a bill drawn at sight, and which must be presented within a reasonable time, the loss thereof will excuse a reasonable delay;[4] and if, upon its loss, a second one be given by the drawer, necessary delay in presenting that will be excused.[5] But where the word "duplicate" was written on the second draft, it was deemed, in view of extrinsic facts, to import that it was made as a substitute for, and to take the place of the original; and the defendant having been discharged from liability upon the original, by laches as to presentment, the plaintiff could not recover on the duplicate.[6]

§ 1174. Story, upon the authority of Pothier, lays down the doctrine, that if the holder has lost or misplaced the bill before acceptance, he should still apply for acceptance thereof, and upon refusal protest the bill.[7] We know of no other authority for this doctrine.

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[1] See Chapter XLVI, on Lost Bills and Notes, and Chapter XXXVIII, on Payment; Thomson on Bills, 204; Story on Bills, § 348; Edwards, 508; Lane v. Bank of West Tenn. 435.

[2] See Chapter XLVI, on Lost Bills and Notes.

[3] See Chapter XLVI, on Lost Bills and Notes.

[4] Aborn v. Bosworth, 1 R. I. 403.

[5] Benton v. Martin, 31 N. Y. (4 Tiff.) 382 (1865).

[6] Benton v. Martin, 1 Hand (N. Y.), 346 (1869); 51 N. Y. (7 Sickels), 572 (1873).

[7] Story on Bills, § 279; Pothier de Change, n. 145.

SECTION IV.

THE APPOINTMENT OF DRAWER OR INDORSER AS EXECUTOR OR ADMINISTRATOR OF MAKER OR ACCEPTOR.

§ 1175. In the *fourth* place, it is well settled that the appointment of the drawer or indorser as executor or administrator of the maker or acceptor does not excuse the holder from making a demand upon him as personal representative,[1] or from giving him notice that he is looked to personally for payment.[2] Demand is indispensable in order to fix the liability of drawer or indorser; and then, it is said, notice to the indorser is necessary in order that he may be informed that the holder does not mean to resort solely to the estate of which he is personal representative, but to him also in his individual character as indorser; and that, if he received no notice, he would have a right to conclude that the holder intended to look to the estate only.[3] But when demand for payment is made to the representative of the maker or acceptor, who is also his indorser, such person would be bound to make the payment primarily for his principal; and it might be reasonably inferred that in the event of his refusal to do so in that character, the like demand applied to him in his individual character. And it would seem to be superfluous to add to it a new and formal notification that he is looked to as indorser for payment.[4] Indeed, knowledge of dishonor obtained by communication from the holder amounts to notice, though knowledge derived from a stranger does not;[5] and it has been held in England, that where a demand was made at the house of the acceptor, and it was answered by the drawer that the acceptor was dead, and that he was his executor, and requesting that the bill might be allowed to stand over for a few days, and he would see it paid—that this was sufficient notice of dishonor.[6] It has been observed

[1] Magruder v. Union Bank, 3 Pet. 87; 7 Pet. 287; Juniata Bank v. Hale, 16 S. & R. 157; Story on Bills, § 376.

[2] Ibid.

[3] Juniata Bank v. Hale, 16 S. & R. 157.

[4] 1 Parsons N. & B. 526.

[5] Miers v. Brown, 11 Mees. & W. 372; Tindal v. Brown, 1 T. R. 167.

[6] Caunt v. Thompson, 7 Com. B. 400. Creswell, J., after quoting cases cited

that the case cited "does not decide that where the party sought to be charged has become executor of the payor, notice is dispensed with, but that the circumstance in that particular case constituted notice."[1] But it seems to have been considered by the court, that information of dishonor derived in such a manner from the holder necessarily constituted notice.

If the maker die, leaving his estate insolvent, neither demand[2] nor notice[3] will be excused.

SECTION V.

THE TRANSFER OF THE BILL OR NOTE AS COLLATERAL SECUUITY.

§ 1176. In the *fifth* place, if the bill or note has been transferred to the holder by mere delivery without indorsement, as collateral security, the transferrer is not entitled to insist on a strict presentment at maturity to the maker or acceptor; nor will he be released from the debt for which the bill or note is delivered as collateral security, unless he can show that he has actually sustained damage or prejudice by such non-presentment.[4] And to the same extent only can he claim exoneration by failure to give him due notice.[5]

This circumstance of transfer without indorsement as collateral security, is generally enumerated amongst the cases in which presentment and notice are dispensed with or excused; but really it is simply a case in which the transferrer does not come at all within the rule entitling him to notice.[6]

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in preceding note, says: "In substance, these cases seem to establish, that in order to hold a prior holder responsible, he must derive from some person entitled to call for payment information that the bill has been dishonored, and that the party is in condition to sue him; from which he may infer that he will be held responsible."

[1] Redfield & Bigelow's Leading Cases, 428.

[2] Gower v. Moore, 25 Me. 16; Johnson v. Haith, 1 Bailey, 482.

[3] Lawrence v. Langley, 14 N. H. 70.

[4] Van Wart v. Woolley, 3 B. & Cres. 439; Swinyard v. Bowes, 5 M. & S. 62; Story on Notes, § 284; Story on Bills, § 372.

[5] Ibid.

[6] Story on Bills, § 372.

It is true that Mr. Chitty has several times in his treatise declared that a transferrer by delivery of a note or bill payable to bearer, is ordinarily entitled to regular notice as a party to the bill;[1] but this is incorrect. Declining to indorse, he declines to become a party to the bill, and the only liability which he incurs is for the consideration given, which if the instrument be forged or illegal (and in England if it be worthless by reason of insolvency of the parties) may be received back.[2] He is in no sense a party, and not entitled to strict demand and notice.[3]

SECTION VI.

THE DEATH OF THE MAKER OR ACCEPTOR.

§ 1177. *In the sixth place.*—The death of the maker of a note, or acceptor of a bill, is no excuse for want of presentment for payment. In such a case, the holder should make presentment to executor or administrator of the deceased, if one has been appointed, and his whereabouts can be ascertained;[4] or if there be no personal representative, the presentment should be made at the house of the deceased,[5] unless, indeed, the instrument be payable at a particular place, in which case presentment there is always sufficient.[6] Nor is this circumstance an excuse for want of notice to drawer and indorser.[7] It may be all the more needful, and should be immediately given. It has been held, however, that the indorser who knew of the maker's death when he indorsed in not entitled to notice;[8] but this distinction rests on no sound principle.

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[1] Chitty on Bills (13 Am. ed.) [*443, 479]. [2] See *ante*, §§ 732 *et seq.* vol. 1.

[3] 1 Parsons N. & B. 503; Story on Bills, § 372.

[4] Story on Notes, § 241; Chitty on Bills [*356], 399; Story on Bills, § 318; White v. Stoddard, 11 Gray, 528; Landry v. Stansbury, 10 La. 484; See Chapter XX, on Presentment for Payment, § 591, vol. 1, and Chapter XVII, on Presentment for Acceptance, § 458, vol. 1.

[5] Juniata Bank v. Hale, 16 Serg. & R. 157; Magruder v. Bank of Georgetown, 3 Pet. 87; Story on Notes, § 241; Chitty [*356], 398; Story on Bills, § 346.

[6] Chitty [*356–7], 399; Story on Notes, § 253.

[7] 1 Parsons N. & B. 525; Edwards, 454. See *ante*, § 1000 *et seq.*

[8] Davis v. Francisco, 11 Mo. 572; Edwards on Bills, 489.

In like manner, the death of the drawer or indorser is no excuse for want of notice, which should be give to his personal representative.[1]

§ 1178. When the drawee dies before the bill is presented for acceptance, it is generally stated that it will not operate as an excuse for non-presentment for acceptance.[2] But this may be doubted. The acceptance of the personal representative, to whom it is said the bill should be presented for acceptance, would not be according to the tenor of the bill, whether he bound himself personally, or bound himself to pay out of the decedent's assets; and as the holder would not be bound (as we think) to take such an acceptance, there is no reason why he should be required to present the bill for such acceptance.[3] There is an obvious difference between this, and the presentment to the personal representative for payment. He may have assets, and be ready to pay, and it is due to drawer and indorsers to afford him the opportunity.[4]

§ 1179. But even as to presentment for payment, the death of the maker or acceptor has been held to operate as an excuse.

Thus where an executor or administrator is allowed by law a certain time, within which to settle up the estate, and is not liable before its expiration, he will seldom hazard the payment of a debt before he has ascertained the condition of the estate, or pay the debt before he is obliged to do so; and a demand upon him would doubtless be met with a refusal. "And therefore" (as said by Parker, C. J.) "such a demand would be merely a troublesome formality, without any use; and notice to the indorser that, the promisor being dead, he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the

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[1] See Chapter XXIX, on Notice, Sec. IV; Oriental Bank v. Blake, 22 Pick. 206.

[2] Story on Bills, § 230.

[3] See Chapter XVII, on Presentment for Acceptance, § 458, vol. 1.

[4] Edwards on Bills, 454.

promisor."[1] In England a different policy and a different rule exist.[2] The fact that the indorser is the personal representative of the maker will not excuse non-presentment to him.[3]

SECTION VII.

THE MISDATING OF A BILL OR NOTE BY A FOREIGN RESIDENT.

§ 1180. *In the seventh place:* When a foreign resident dates a bill or note in another State, where he executes and delivers it, and if he knew of such foreigner's residence at the time he received the note, or learned it within such period as afforded him time to present it, it would be his duty to do so.[4] Whether, indeed, the holder would be excused, even if misled by the date, is questionable. Certainly the burden would be upon him to show that he was misled. In all cases the holder must exercise due diligence,

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[1] Hale v. Burr, 12 Mass. 86; see also Landry v. Stansbury, 10 La. 485; Oriental Bank v. Blake, 22 Pick. 206.

[2] Hale v. Burr, *supra.*

[3] Magruder v. Union Bank, 3 Pet. 87; 7 Id. 287. See *ante*, § 1175.

[4] Taylor v. Snyder, 3 Den. 145; Burrows v. Hannegan, 1 McLean, 309; Bank of Orleans v. Whittemore, 12 Gray, 473, the Court saying: "Where the maker of a note, when it is made and indorsed, has a known residence out of the State, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of non-payment given to the indorser before the indorser can be charged. So it was decided by the Court of Appeals in New York, in Taylor v. Snyder, before referred to, and in Spies v. Gilmore, 1 Comst. 321. In this last case, Bronson, J., said: 'The only excuse which has been offered for not making demand is, that it would have been inconvenient to go or send to Matamoras for the purpose. It is often inconvenient to present the note for payment when the maker and holder both reside in the same State; and yet, when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting demand. And this is so, however wide asunder the maker and holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made, for the purpose of promoting his own convenience.'" 1 Parsons N. & B. 459, note c.

and the only question is, what does due diligence require? The holder may, as it seems, presume the party making the note to reside where he has dated it, and may proceed accordingly to inquire for him at that place, and prepare to make presentment there at maturity. If, then, he learns for the first time that he resides elsewhere, his failure to present to him would be excused. Such, at least, seems to us the correct doctrine.[1] There are authorities which maintain the view that if the maker of a note resides and has his domicile in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there.[2]

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[1] Smith v. Philbrick, 10 Gray, 252; Meyer v. Hibscher, 47 N. Y. 270; Stayler v. Williams, 24 Md. 199; Apperson v. Bynum, 5 Cold. 348; Moodie v. Morrall, 3 Const. 367. See especially Chapter XX, on Presentment for Payment, §§ 639 *et seq.* vol. 1, and Chapter XXIX, on Notice of Dishonor, Sec. VI, vol. 2.

[2] Story on Notes, 1236; Hepburn v. Toledano, 10 Mart. (La.) 643.

BOOK V.

ACTION ON NEGOTIABLE INSTRUMENTS; AND DEFENSES, DISCHARGES AND DAMAGES.

CHAPTER XXXVII.

ACTION OR SUIT UPON BILLS AND NOTES.

SECTION I.

GENERAL PRINCIPLES AS TO WHO MAY SUE.

§ 1181. It is not within the province of this volume to treat otherwise than incidentally of those questions which concern negotiable instruments in a collateral way, rather than being immediately associated with their negotiable qualities. Therefore this chapter will not enter into any minute discussion of the intricacies of pleading and practice involved in the prosecution of a suit upon a bill or note, but confine itself to a statement of the leading general principles of the most important character. Any holder of a bill or note who can trace a clear legal title to it, is entitled to sue upon it in his own name, whether he possesses the beneficial interest in its contents or not.[1] If the note be payable to A. or B., it may be sued upon by them jointly or by either one of them.[2] If there be a special indorsement, or assignment to a particular person, he is the proper person to sue; and if he is in possession he may sue although his name be indorsed on the paper after the special indorsement or assignment. For in such case his indorsement will be pre-

[1] Caldwell v. Lawrence, 84 Ill. 161.

[2] Westgate v. Healy, 4 R. I. 524.

sumed to be a mere memorandum, or evidence that he had negotiated the paper and then taken it up.[1]

Receivers, assignees,[2] trustees,[3] or personal representatives[4] may sue on a note or bill payable to bearer, or indorsed in blank. And the donee *causa mortis* of a note payable to the donor's order may use the name of his personal representative, even against his protest.[5] But a mere depositary of such a note cannot maintain suit.[6] If the paper be indorsed specially to a particular person, none but such person or his representative can sue.[7]

§ 1182. *In partnership cases.*—If a bill or note be made payable to, or indorsed specially to a firm, all the partners must join in the suit;[8] and if so payable or indorsed to A. & Co., A. cannot recover unless he shows that he alone composed the nominal firm.[9] If one of the copartners of a firm should die, suit should be brought by the survivor or survivors;[10] but if the paper be indorsed in blank to a firm, either copartner may fill it up in his own name and sue,[11] even though one of the copartners be dead.[12]

§ 1183. A copartner cannot sue a firm of which he is a member, upon a bill or note payable by it to himself, because he would be in fact suing himself;[13] but if a firm make its bill or note payable to the order of a copartner, and the latter indorse it, the indorsee may sue.[14] Nor will an indorsement by one of a firm which is the payee of a note to an-

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[1] Humphreyville v. Culver, 73 Ill. 485. See § 1198.

[2] Smith v. Kendal, 1 Esp. 231; 6 T. R. 123; Bowman v. Wood, 15 Mass. 534.

[3] Haxtun v. Bishop, 3 Wend. 13.

[4] See *ante*, § 264, vol. 1; 2 Parsons N. & B. 446.

[5] Grover v. Grover, 24 Pick. 261; Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Brown v. Brown, 18 Conn. 410.

[6] Sherwood v. Roys, 14 Pick. 172. [7] See vol. 1, § 692.

[8] Guidon v. Robson, 2 Camp. 302; Attwood v. Rattenbury, 6 J. B. Moore, 579.

[9] Robb v. Bailey, 13 La. Ann. 457. [10] Parsons on Partnership, 447.

[11] Lovell v. Evertson, 11 Johns. 52.

[12] Atwood v. Rattenbury, 6 J. B. Moore, 579.

[13] Parsons on Partnership, 510, note.

[14] Thayer v. Buffum, 11 Metc. 398; Davis v. Briggs, 39 Me. 304.

other, enable the latter to sue thereon in his own name; for anything less than indorsement of the partnership name is an irregularity and a departure from the legitimate mode of transfer in such cases.[1] but if a note indorsed by two of three payees to the third payee and a stranger, be subsequently indorsed by the third payee, the indorsee may sue in his own name.[2] And a firm may indorse to one member who may sue.[3]

§ 1184. *In cases of married women.*—On a bill or note given to a single woman, who afterward marries, the husband must join her in the action.[4] If she dies, the right of action is in her personal representative, not in the husband.[5] If the husband dies, the right of action is in her, and not in the husband's personal representative.[6] So the right of action survives to the wife, upon a note payable to husband and wife, when the husband dies, and does not pass to his representative.[7]

On a bill or note made payable to a married woman after marriage the husband may sue alone as payable to him,[8] or he may join in an action with his wife.[9] If payable to the husband, or to his wife, in the alternative, he should sue.[10]

The wife cannot sue her husband on a note made by him to her after marriage;[11] nor on a joint and several note made to her by him and others;[12] but in this case if he dies she may sue the others.[13]

§ 1185. If the instrument be payable to "A. for the use of B.," A. is the proper person to bring the suit.[14] One who

[1] Estabrook v. Smith, 6 Gray, 570. [2] Goddard v. Lyman, 14 Pick. 268.

[3] Manegold v. Dulan, 30 Wisc. 541.

[4] Sherrington v. Yates, 12 M. & W. 855; overruling M'Neilage v. Holloway, 1 B. & Ald. 218.

[5] Hart v. Stephens, 6 Q. B. 637.

[6] Stanwood v. Stanwood, 17 Mass. 57; Dean v. Richmond, 5 Pick. 461.

[7] May v. Boisseau, 12 Leigh, 512; Perkins v. Clements, 1 Pat. & H. 151; Draper v. Jackson, 16 Mass. 480.

[8] Burrough v. Moss, 10 B. & C. 558.

[9] Philliskirk v. Pluckwell, 2 Maule & S. 393.

[10] Young v. Ward, 21 Ill. 223. [11] Sweat v. Hall, 8 Vt. 187.

[12] Richards v. Richards, 2 B. & Ad. 447. [13] Ibid.

[14] Barry Co. v. McGlothlin, 19 Mo. 397; Cramlington v. Evans, 2 Ventris, 307.

has paid a note to the payee, who indorsed it to him upon payment, may sue as indorsee againt the maker, though he is a party to the note as guarantor.[1] In some cases it is held that the plaintiff may sue in a fictitious name.[2]

A deposit book issued by a savings bank is not negotiable, and the assignee of it cannot sue the bank in his own name.[3]

§ 1186. Any person not originally a party, but who has paid the bill *supra protest* may sue all parties not subsequent to the party for whose honor he has paid;[4] but a banker who pays the acceptance of a customer, payable at his house, but unprovided for, does not stand on the footing of the party paying *supra protest*, and must sue for the consideration.[5]

SECTION II.

WHEN INSTRUMENT IS PAYABLE TO AN AGENT.

§ 1187. *Who may sue.*—Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that, when the bill or note is payable to a certain person by name, but describing him as agent of another person also named—as, for instance, "A. B., agent for C. D."—the suit must be brought in the name of the agent, and cannot be brought in the name of the principal;[6] and that *a fortiori* must the suit be so brought when the instrument is simply payable to "A. B., agent," no principal being named.[7] But in either case, the better doc-

[1] McGregory v. McGregory, 107 Mass. 543.

[2] Epting v. Jones, 47 Ga. 622. See also Ogilby v. Wallace, 2 Hall, 553; Pearce v. Austin, 4 Whart. 489.

[3] Howard v. Windham Co. S. B. 40 Vt. 597.

[4] Chitty on Bills [*537], 609.

[5] Holroyd v. Whitehead, 5 Taunt. 444; 3 Camp. 530.

[6] Cocke v. Dickens, 4 Yerg. 29, the note being payable to C. E. McEwing, agent for the executors of Joseph Branch; Shepherd v. Evans, 9 Ind. 260; Rutherford v. Mitchell, Mart. & Yerg. 261; Rose v. Laffan, 2 Speers, 424.

[7] Alston v. Heartman, 2 Ala. 699; Horah v. Long, 4 Dev. & Bat. 274.

trine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper, would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name, when it is clear from the face of the paper that if so used it would be as the representative of his own.[1] And where the principal is undisclosed on the face of the paper, he might also sue in his own name; but in such case mere possession of the paper would not be sufficient evidence that he was the principal intended, and it would be necessary for him to supply that element in his title to recover by parol proof.[2] In the case of instruments payable to bank cashiers it might be different. Delivery of a note to an agent without indorsement would not authorize him to sue.[3]

§ 1188. *Official agents.*—Numerous cases have arisen in which this question has been presented upon bills and notes payable to the official agents of corporations or States; and the authorities now greatly preponderate in favor of the doctrine, that where a bill or note is made payable or is indorsed to a certain person, designated by his official title, suit may be brought in his name, or it may be brought in the name of the principal whom he officially represents, when such principal is named; and if the principal be not named, that evidence *aliunde* is admissible to show who the principal is. Thus, it has been held that a bill or note payable or indorsed to "A. B. C., cashier, or order," may be sued upon by the bank of which the payee is cashier, although it is not named.[4]

[1] Binney v. Plumley, 5 Vt. 500; Johnson v. Catlin, 27 Vt. 87; Arlington v. Hinds, 1 D. Chip. 431; Fairchild v. Adams, 16 Pick. 383.

[2] See Rutland &c. R. R. Co. v. Cole, 24 Vt. 38.

[3] Nicholls v. Gross, 26 Ohio St. 425.

[4] Baldwin v. Bank of Newburg, 1 Wall. 239; Garton v. Union City Bank, 34

A fortiori such would be the case if the bank were named.[1] But suit could also be sustained by the cashier in his own name.[2] So it has been held, that a note payable to "J. R., agent of the Southern Life and Trust Co.," might be sued upon by the corporation.[3] Where the payee "or his successor in office" is named, it is specially indicated that the corporation was intended; and it may sue in its own name.[4] And if the office is named without mention of the person, as, for instance, "payable to the cashier of the First National Bank," the same view would apply.[5] Where the note was indorsed to "C. J., President M. P. F.," it was held, the company could sustain suit by proving the note was intended to be transferred to it.[6]

§ 1189. The contrary doctrine, that only the agent can sue, rests upon the view that the official station is merely mentioned to designate the person intended;[7] but the fact in

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Mich. 279; First National Bank of Angelica v. Hale, 44 N. Y. 395 (1871); Bank of New York v. Bank of Ohio, 29 N. Y. 619; Bank of Genessee v. Patchin Bank, 19 N. Y. 312; Watervliet Bank v. White, 1 Denio, 609; Wright v. Boyd, 3 Barb. 523; Barney v. Newcomb, 9 Cush. 46; Rutland &c. R. R. Co. v. Cole, 24 Vt. 38; see Chapter XIII, on Corporations, § 417, vol. 1; Pratt v. Topeka, 12 Kansas, 570.

[1] Commercial Bank v. French, 21 Pick. 486.

[2] Fairchild v. Adams, 16 Pick. 381.

[3] Southern Life Ins. &c. Co. v. Gray, 3 Fla. 262.

[4] Trustees &c. v. Parks, 10 Me. 441. In Board of Supervisors v. Hall, 42 Wisc. 59, the note was made payable to "the Supervisors of Ocono County, or their successors in office." It was held a good note to the county, and that the board of supervisors might sue, the Court saying: "A misdescription of the character of the payee will not vitiate, provided it can be collected, who was the party intended."

[5] Commercial Bank v. French, 21 Pick. 486.

[6] Dupont v. Mount Pleasant Ferry Co. 9 Rich. (Law), 255.

[7] Bank United States v. Lyman, 20 Vt. 666. The Bank of United States sued in the U. S. Circuit Court upon a note payable to "Samuel Jaudon, Esquire, cashier, or order." The Court said, per Prentiss, J.: "The promise therefore is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to allow the Bank of the United States, or any one else, without his order, to demand and enforce payment of it by suit." But a different view prevails in the State courts of Vermont. Rutland &c. R. R. Co. v. Cole, 24 Vt. 38. It was held in the following cases, that the agent alone could sue: Horah v. Long, 4 Dev. & B. 274, where the note was payable to "W. H. H., Cashier, or order;" Rose v. Laffan, 2 Speers, 424, the note being payable to

actual business is generally otherwise, and a theory about commercial affairs opposed to commercial practice cannot be otherwise than injurious and impracticable.

It is undoubtedly a matter of daily practice to make notes, drafts, acceptances and indorsements payable to the cashiers or treasurers of financial institutions by such abbreviations as, "to J. Smith, Cas.," or "J. S., Cash.," or "Cashier," or "Treas." When the corporation sues on such a paper, it is upon the theory and averment that it was made payable to it by the name of the official; and the production of the instrument in its possession is sufficient *prima facie* evidence to sustain its suit.

A distinction has been taken in some cases, to the effect that a bill or note payable to an agent or officer of a company not incorporated may be sued in his name; but if the company be incorporated its own name must be used.[1]

The like principle applies when the instrument is payable to the official agent of a State or country; and the State or country may sue upon it in its own name. It has been so held where the instruments were payable "to Levi Woodbury, Secretary of the United States, or his successors in

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"A. G. Rose, Cashier;" so, where the notes ran, "to W. G., Treasurer of Third Parish in Dedham," Fisher v. Ellis, 3 Pick. 322; to "The Treasurer of the Proprietors of the new meeting house in N., or his successor in office," Clap v. Day, 2 Greenl. 305. In Van Ness v. Forrest, 8 Cranch, 30, where a commercial company, consisting of four or five hundred members, sold merchandise, the property of the company, and took from the purchaser his note for the purchase money, payable to Joseph Forrest, president of the company, it was held that suit should be brought in the name of the promisee against the maker of the note and his dormant partner, notwithstanding such dormant partner was also a partner of the commercial company. And it was said by Marshall, C. J.: "Suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company than if it had been given to a person not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money, in his own name, as a trustee for the company. Upon the record, and technically speaking, he is the sole plaintiff, and the court can perceive no reasonable or legal objection to his sustaining an action on the note." See also Harrow v. Dugan, 6 Dana, 341; McConnel v. Thomas, 2 Scam. 313; Ramsey v. Anderson, 1 McMull. 300; 2 Parsons N. & B. 451.

[1] Southern Life Ins. &c. Co. v. Gray, 3 Fla. 262; McConnel v. Thomas, 2 Scam. 313.

office;"[1] to "T. T. Tucker, Treasurer of the U. S., or order;"[2] to "James Irish, Land Agent of Maine."[3]

SECTION III.

WHO MAY SUE UPON INSTRUMENTS PAYABLE TO ONE PARTY AND DISCOUNTED BY ANOTHER.

§ 1190. A nice question is presented when a note made to raise money is expressed as payable to a certain bank, and is then discounted by another party, the bank named as payee never having any interest in it. Thus suppose the "Cheshire Bank" is named as payee, and A. B. discounts the note, it has been held that in such case the plaintiff may declare upon the note as payable to him by the name of the Cheshire Bank.[4] It has also been held that suit might be brought in the name of the payee for the benefit of the holder. Should the payee expressly consent, or impliedly by receiving the note for the person advancing the money, his name might be used;[5] but otherwise we cannot see how a mere stranger can be unwillingly brought into a controversy to which he has no proper legal relation, and it has been held that if the payee refuse the use of his name, it cannot be used.[6] Some cases utterly deny the right to use the payee's name, even with his consent.[7]

Where an accommodation note is made payable and negotiable at a particular bank, it has been held that when

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[1] United States v. Boice, 2 McLean, 352.

[2] Dugan v. United States, 3 Wheat. 172.

[3] State of Maine v. Boies, 2 Fairf. 474. See Chapter XVI, § 443, vol. 1.

[4] Hunt v. Aldrich, 7 Fost. 31; Elliott v. Abbott, 12 N. A. 549. Query, if holder might not sue in equity in his own name. See Taylor v. Reese, 44 Miss. 89.

[5] Bank of Chenango v. Hyde, 4 Cow. 567; Bank of Newbury v. Rand, 38 N. H. 169; Lime Rock Bank v. Macomber, 29 Me. 564; Granite Bank v. Ellis, 43 Id. 367; Utica Bank v. Ganson, 10 Wend. 314; Farmers & Mechanics' Bank v. Humphrey, 36 Vt. 557; see also Bank of Rutland v. Buck, 5 Wend. 66; Powell v. Waters, 17 Johns. 176; Marvin v. McCallum, 23 Johns. 288.

[6] Bank of Middlebury v. Bingham, 33 Vt. 623.

[7] Adams Bank v. Jones, 16 Pick. 574.

not discounted by it, but by another person, the latter acquires no right of action against the accommodation party, who must be taken to have limited the right of negotiation to the particular bank, and he cannot sue even in its name.[1] But the better opinion seems to be that this would not be such a diversion of the paper as to discharge the accomodation parties.[2]

When a note payable to a third person has not been negotiated by him, but is in the hands of another, who sues in the payee's name, it seems that it is *prima facie* evidence of an equitable assignment by the payee to the holder, which carries authority to use his name.[3]

SECTION IV.

WHO MAY SUE UPON INSTRUMENTS PAYABLE TO BEARER OR INDORSED IN BLANK.

§ 1191. The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer, or indorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is *prima facie* sufficient evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of *mala fides*.[4] And, as has been said in Maryland, by Chambers, J.: "Courts will never inquire whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless

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[1] Dewey v. Cochran, 4 Jones L. (N. C.) 184; Clinton Bank v. Ayres, 16 Ohio, 282. See Dixon v. Dixon, 31 Vt. 450; Quinn v. Hard, 43 Vt. 375.

[2] Utica Bank v. Ganson, 10 Wend. 315; Commercial Bank v. Claiborne, 5 How. (Miss.) 301; Briggs v. Boyd, 37 Vt. 534; Farmers' &c. Bank v. Humphrey, 36 Vt. 557.

[3] Harriman v. Hill, 14 Me. 127.

[4] Demuth v. Cutler, 50 Me. 300; Patten v. Moses, 49 Me. 255; Wheeler v. Johnson, 97 Mass. 39; Craig v. Twomey, 14 Gray, 486; Palmer v. Nassau Bank, 78 Ill. 380.

in an allegation of *mala fides*, and the blank indorsement may be filled up at the moment of trial."[1]

§ 1192. It matters not that such nominal holder will receive the amount as trustee,[2] agent,[3] or pledgee.[4] The suit by him holding the paper shows his title to recover; and it cannot matter to the defendant who discharges the debt that the plaintiff is accountable over to a third party. Thus where the plaintiffs had bought a bill for a correspondent, and had been reimbursed the amount paid, Wightman, J., said: "They have been reimbursed, and the beneficial interest has been transferred, but the legal interest is in them, and they may still sue as trustees."[5] Evidence, however, that the plaintiff has no interest in the instrument, will be competent when foundation has been laid for its introduction by offer to prove offset, or rather defense, available against a third person who is its true owner. And if the indorsement be expressed "for collection," it has been held that the indorsee is not such a holder as may sue.[6]

§ 1193. "An indorsement in blank confers a joint right of action to as many as agree in suing on the bill."[7] And, therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterward dishonored and returned to them, and they paid the amount among them, it was held that they might bring a joint action against a previous indorser.[8] But where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A., B. & Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for

[1] Whiteford v. Burckmyer, 1 Gill, 127.

[2] Nicolay v. Fritschle, 40 Mo. 67; Lovell v. Evertson, 11 Johns. 52; Wells v. Schoonover, 9 Heisk. 805.

[3] King v. Fleece, 7 Heisk. 274; Gregory v. McNealy, 12 Fla. 378: Boyd v. Corbitt, 37 Mich. 52.

[4] Bowman v. Wood, 15 Mass. 534; Bank of Charleston v. Chambers, 11 Rich. 657; Tarbell v. Sturtevant, 26 Vt. 513.

[5] Poirier v. Morris, 2 Ellis & B. 89.

[6] Rock Co. Nat. Bank v. Hollister, 21 Minn. 385.

[7] Ord v. Portal, 3 Camp. 239, Lord Ellenborough.

[8] Low v. Copestake, 3 C. & P. 300 (14 E. C. L. R.); Byles [*144], 262.

the benefit of his creditors, Lord Ellenborough held that A. and B., two of the members of this firm, and also trustees, could not, conjointly with another trustee who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise.[1]

§ 1194. *The holder of a note blank as to the payee* may fill it up with his own name and sue upon it.[2] If payable to a fictitious person, it may be sued on as payable to bearer.[3] The holder of such a paper, in transferring it, should not use the fictitious name, but pass it by delivery only, or by indorsement.[4]

§ 1195. *The holder under an indorsement in blank* may file it in his own name before bringing suit, or at the trial;[5] and even after the trial, where judgment has gone for the plaintiff under the impression that the indorsement had been filled up, the correction being made *nunc pro tunc*.[6]

But the filling up of the blank indorsement is formal merely, and it is not necessary that it should be filled up at all, for the mere act of suing upon it by the holder evidences his intention to treat the indorser as a transferrer and indorser to himself.[7] This seems to us clearly the correct doctrine, and results from the principle stated by Lord Ellenborough, that the exercise of the power to fill up a blank indorsement so as to make it payable to the holder is only *expressio eorum quæ tacite insunt*.[8]

But it has been held absolutely necessary that the in-

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[1] Machell v. Kinnear, 1 Stark, 499 (2 E. C. L. R.); Byles [*144], 262.

[2] Crutchley v. Clarence, 2 Maule & S. 90; see Chapter V, Sec. III, vol. 1.

[3] 2 Parsons N. & B. 448. [4] Maniort v. Roberts, 4 E. D. Smith, 83.

[5] Lovell v. Evertson, 11 Johns. 52; Hance v. Miller, 21 Ill. 636; Edwards v. Scull, 8 Eng. (Ark.) 325; Olcott v. Rathbone, 5 Wend. 490; Kennon v. McRea, 7 Port. (Ala.) 175; Kiersted v. Rogers, 6 Har. & J. 282; Fairfield v. Adams, 16 Pick. 381; Croskey v. Skinner, 44 Ill. 321.

[6] Whittier v. Hayden, 9 Allen, 408.

[7] Rees v. Conococheague Bank, 5 Rand. 329; Poorman v. Mills, 35 Cal. 118.

[8] Vincent v. Horlock, 1 Camp. 442. In this case the indorsement was filled up.

dorsement should be filled up before judgment, and that otherwise judgment would be had.[1]

§ 1196. If the plaintiff omit to state in his declaration all the indorsements after the first indorsement in blank, he may strike out the intervening indorsements, and aver that the first blank indorser indorsed immediately to himself.[2] Abbott, C. J., has said on this subject: "All the indorsements must be proved or struck out, although not stated in the declaration. I remember Bailey, J., so ruling, and striking them out himself on the trial; and this need not be done before the trial;[3] but may be done after the plaintiff has finished his case."[4] So where the action is against an indorser, and there are several indorsements between the payee's indorsement and the defendant's, the plaintiff may state in his declaration that the payee indorsed to the defendant.[5] It seems doubtful, however, whether the plaintiff can avail himself of the title of an indorser whose name he has struck out.[6]

§ 1197. *If the bill or note be not payable to bearer or indorsed in blank*, or indorsed specially to himself, the holder cannot (unless authorized by statute) sue in his own name, for although he may possess the entire beneficial interest, the legal title is still outstanding in his transferrer, and he must use his name in order to maintain the suit.[7] By leaving the instrument unindorsed, the transferrer necessitates and authorizes the use of his name to the recovery of the amount; and he cannot object to its use, or release the action when instituted.[8] But if the transferrer indorses the paper, then

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[1] Hudson v. Goodwin, 5 Har. & J. 115.

[2] Byles on Bills [*149], 268; Rand v. Dovey, 83 Penn. St. 281; Mayer v. Jadis, 1 M. & Rob. 247; Merz v. Kaiser, 20 La. Ann. 379.

[3] Cocks v. Borradale, MS.; Chitty on Bills [*462], 719; Byles [*149], 268.

[4] Mayer v. Jadis, 1 M. & Rob. 247.

[5] Chaters v. Bell, 4 Esp. 210.

[6] Davies v. Dodd, 1 Wils. Exch. 110; 4 Price, 176; Byles [*149], 269.

[7] Allen v. Newbury, 8 Iowa, 65; Farwell v. Tyler, 5 Iowa, 535; Parham v. Murphee, 16 Mart. (La.) 355; Allen v. Ayres, 3 Pick. 289; Hull v. Conover, 35 Ind. 372. It is held in Alabama, that if the transfer is by a separate instrument, the assignee may sue in his own name. Morris v. Poillon, 50 Ala. 403.

[8] Paese v. Hirst, 10 Barn. & C. 123; Amherst Academy v. Cowles, 6 Pick. 427;

his name cannot be used save by his own consent; for then the legal title and right to sue is vested in his indorsee.[1] But if suit is commenced without his consent, he may subsequently assent to it.[2]

§ 1198. When there appears upon a bill or note an indorsement by the plaintiff, and subsequent indorsements to his, the question has been raised whether or not he could sustain the suit without showing a retransfer of the paper to himself. The better opinion is that he can. The Supreme Court of the United States took an opposite view in an early case,[3] and there are cases concurring with it.[4] But the Supreme Court subsequently affirmed the doctrine of the text,[5] and it has also the authority of a number of State decisions.[6] And the holder may always strike out a special indorsement, and bring suit under any indorsement in blank.[7] Where there appears on the paper the plaintiff's own indorsement, it will be presumed that it has been returned to him as his own property, and that he has the right to sue upon it;[8] and clearly if his indorsement be to another "for collection," he would have the right to sue, for if paid the proceeds would belong to him.[9]

Burton v. Dees, 4 Yerg. 4. The holder may also sue in equity in his own name. Taylor v. Reese, 44 Miss. 89.

[1] Bowie v. Duval, 1 Gill & J. 175; Bragg v. Greenleaf, 14 Me. 395; Mosher v. Allen, 16 Mass. 451; Skowhegan Bank v. Baker, 36 Me. 154; Coleman v. Biedman, 7 C. B. 871.

[2] Golder v. Foss, 43 Me. 364.

[3] Welch v. Lindo, 7 Cranch, 159.

[4] Robson v. Earley, 13 Mart. (La.) 373; Sprigg v. Cuny, 19 Mart. (La.) 253; Southern Bank v. Mechanics' Savings Bank, 27 Ga. 253.

[5] Dugan v. United States, 3 Wheat. 172.

[6] Dollfuss v. Frosch, 1 Denio, 367; Whittenhall v. Korber, 12 Kansas, 618; see cases cited in Chapter XX, on Presentment for Payment, § 576, vol. 1; also Caldwell v. Evans, 5 Bush (Ky.), 380; Canton &c. Assn. v. Weber, 34 Md. 669.

[7] Wetherell v. Ela, 42 N. H. 295.

[8] See *ante*, § 1181; Beeson v. Lippman, 52 Ala. 296; Pitts v. Keyser, 1 Stew. 154; Evans v. Gordon, 8 Porter, 142; Wickersham v. Jarvis, 2 Mo. App. 280; Humphreyville v. Culver, 73 Ill. 435.

[9] Locke v. Leonard Silk Co. 37 Mich. 479; Best v. Nakomis National Bank, 76 Ill. 608.

SECTION V.

WHAT CONSTITUTES THE RIGHT TO SUE, AND THE EVIDENCE THEREOF.

§ 1199. *The right to sue in one's own name must exist at time of suit brought, if it be in that form;* and if a holder of a note delivered to him without indorsement, sue before obtaining an indorsement, in his own name, an indorsement made afterwards, but before trial, will not avail.[1] And so the right to sue must continue during the suit; and if the plaintiff transfers the instrument pending the action, it has been held that it operates as a discontinuance; and that although he may repurchase the paper, he cannot restore the right to prosecute an action which he has once abated by his own act.[2] But to lay an embargo upon a negotiable instrument merely because it is in suit would greatly impair its value, and embarrass the holder; and the better opinion is that the transfer may be made with the agreement that the action should continue for the benefit of the transferee; and that in the absence of evidence it would be presumed.[3] Where principal and surety are sued, and the latter pays the amount pending suit, it may be continued against the principal as commenced for his benefit.[4]

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[1] Dowell v. Brown, 13 Sm. & M. 43.

[2] Vila v. Weston, 33 Conn. 49; Curtis v. Bemis, 26 Conn. 1; Lee v. Jilson, 9 Conn. 94.

[3] 2 Parsons N. & B. 454. In Alabama it is held that the effect of the transfer of a note pending suit "is to make the transferree the beneficiary of the nominal plaintiff," and that such transfer "does not violate the rights of the parties." Penn v. Edwards, 50 Ala. 63. See Ober v. Goodridge, 27 Gratt. 888, where no exception was taken to transfer pending suit, and § 728.

[4] Low v. Blodgett, 1 Fost. 121. Clearly a second action is not barred. Deuters v. Townsend, 5 Best & S. 117; E. C. L. R. 618 (1864), Crompton, J.: "Byles on Bills, p. 159, 8th ed., and Chitty on Bills, p. 157, 10th ed., are cited to show that if an indorsee takes a bill with notice that an action is pending, it is a defense for the acceptor. If this means that that fact can be pleaded in bar against the maintenance of the second action, it is contrary to principle, and the authorities cited for it do not bear it out. In Marsh v. Newell, 1 Taunt. 109, the question was whether the court could under those circumstances stay the action; which was entirely a matter for their equitable jurisdiction. In Colombies v.

§ 1200. *Possession is in itself prima facie evidence of the right of the party to sue* and receive the money when he holds under a legal title, and also that the title, although not expressly, is actually vested in him. And therefore in order to defeat his suit, it must be shown that he is a *mala fide* holder.[1] As said in a Maryland case, by Chambers, J.: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill would entitle the holder to sue."[2]

Therefore, where a note was indorsed to "C. B. Austin, agent of the Union Glass Works," it was held that the suit might be brought in the agent's name, and the Court said: "Here there is no allegation of *mala fides*, so that the case stands clear of that objection. The suit is brought by Austin, who is a trustee or agent for the company. Stating that he is the agent of the Union Glass Works, is equivalent to saying that the suit is for their use."[3] But if a note were payable "to the Stansbury Oyster Co.," possession by one Stansbury would not be evidence of title.[4]

§ 1201. Possession of the instrument is not always necessary in order to institute a suit. If the holder has indorsed a note in blank and pledged it as collateral security, he may

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Slim, 2 Chit. 637, the court decided that a plea of this sort was bad for want of an averment of notice of the bill being overdue. But they proceed to say that if there had been notice of indorsement, and the second action were brought to oppress the defendant, it would be otherwise. That very expression shows, that that is not the substance of a plea in bar, for you could not introduce an averment that the action was brought with a view to oppress. But it is very good ground for an application to stay the proceedings on the first action. The only other authority is Jones v. Lane, 3 Y. & C. 281. All that amounts to is, that Alderson, B., threw out obiter, there might be a difference in consequence of the indorsee having notice of the former action; but he expressly says that it was not necessary to decide upon it, and that he should like to hear further argument."

[1] Wheeler v. Johnson, 97 Mass. 39; Pettee v. Prout, 3 Gray, 502; and see cases cited in Chapter XXIV, Sec. VI, § 812, vol. 1, and also Chapter XX, § 573, vol. 1.

[2] Whiteford v. Burckmyer, 1 Gill, 127; Crosthwait v. Miscuer, 13 Bush (Ky.), 543; Wells v. Schoonover, 9 Heisk. 805.

[3] Pearce v. Austin, 4 Whart. 489.

[4] Redmond v. Stansbury, 24 Mich. 406.

negotiate it to a third person, while still pledged, and such person may sue as indorsee while it is still in pledge, and maintain an action by discharging the lien and producing the note at the trial.[1]

The holder of a bill or note as collateral security for an indorsement by him of another bill or note, cannot recover if he gratuitously pays the paper indorsed by him, not being duly charged thereon.[2]

SECTION VI.

WHO MAY BE SUED.

§ 1202. As a general rule, the holder may sue all the prior parties on the bill or note, but not any subsequent party. Thus a payee may sue the acceptor or maker. An indorsee may sue the acceptor or maker, and all prior indorsers.

Ordinarily an action cannot be maintained against a party subsequent to the plaintiff; for if it were otherwise, the defendant in such action might as indorsee recover back from the plaintiff the very amount recovered of him.[3] But if the plaintiff had originally indorsed the instrument to the defendant without recourse or without consideration, and the latter had indorsed back to him absolutely and for value, this view would not apply.[4] And where the payee of a bill indorsed it specially to the plaintiff, and then the defendant, and after him the plaintiff indorsed it, it was held that the plaintiff might sue him, as his indorsement was equivalent to a new drawing.[5]

§ 1203. At common law, the holder of a bill or note might commence and prosecute several actions against each

[1] Fisher v. Bradford, 7 Greenl. 28; see Richardson v. Lincoln, 5 Mete. 201; Marsh v. Newell, 1 Taunt. 109.

[2] Bachellor v. Priest, 12 Pick. 399.

[3] Bishop v. Hayward, 4 T. R. 470; Britton v. Webb, 2 B. & C. 483.

[4] Bishop v. Hayward, 4 T. R. 470; 2 Parsons N. & B. 459.

[5] Penny v. Innes, 1 Cro. M. & R. 439; see Chitty on Bills, [*242], 276–7, note g.

of the prior parties at the same time; and an action instituted against one would not preclude any other remedy against the others.[1] But satisfaction by any one would discharge all to the plaintiff from liability as to the principal sum.[2] Where a party was liable in the two characters of joint drawer and of acceptor, he might be sued jointly with the other drawers and separately as acceptor.[3]

But by statute in many of the States an action may be maintained and judgment given jointly against all the parties to a negotiable instrument, whether drawers, indorsers or acceptors, or against any one, or any intermediate number of them.[4]

§ 1204. The indorser of a bill or note cannot sue the acceptor or maker until he has paid or satisfied it.[5] But as soon as he does this he may sue the acceptor or maker.[6] And if one indorser sues a prior party, it is not necessary for him to show that he had received notice, provided it was duly received by such prior party.[7] Where there are a number of indorsers, any one may sue, by arrangement between them, all indorsements subsequent to his being stricken out.[8]

§ 1205. "The drawer," says Mr. Chitty, "may maintain an action on the bill against the acceptor, in case of a refusal to pay a bill already accepted, but not on a refusal to accept, in which latter case the action must be special on the contract to accept."[9] Certainly the drawer may sue the acceptor if he has had to pay the bill,[10] or may leave it in the hands of the indorsee to sue for his benefit;[11] but it has been held that he cannot recover without evidence that he has paid the bill.[12]

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[1] Chitty on Bills [*538–9], 610, 611.

[2] *Ex parte* Wildman, 2 Ves. Sr. 115; Farwell v. Hilliard, 3 N. H. 318.

[3] Wise v. Prowse, 9 Price, 393. [4] Code of Virginia (1873), chap. 141, § 11.

[5] Hoyt v. Wilkinson, 10 Pick. 31. [6] M'Donald v. Magruder, 3 Pet. 470.

[7] Ellsworth v. Brewer, 11 Pick. 316.

[8] Walwyn v. St. Quintin, 1 Bos. & Pul. 652.

[9] Chitty on Bills (13th Am. ed.) [*537], 608. See Chapter XIX. vol. 1.

[10] Louviere v. Laubray, 10 Mod. 36; Symonds v. Parminter, 1 Wils. 185; 4 Bro. P. C. 604; Thurman v. Van Brunt, 19 Barb. 410; Chitty [*537].

[11] Williams v. James, 15 Ad. & El. N. S. 69; E. C. L. R. 498 (1850).

[12] Thompson v. Flower, 13 Hart. (La.) 301; 2 Parsons N. & B. 453.

A receipt on the back of the bill, not stating who made payment, does not create the presumption that it was paid by the drawer, but rather that it was paid by the acceptor.[1]

§ 1206. Where the acceptance is for the drawer's accommodation, and the acceptor pays the bill, he cannot sue the drawer upon the bill, for it imports no liability to him, but he may sue for money paid at his request.[2] But an acceptor for honor of the drawer or indorser may sue such drawer or indorser upon the bill itself.[3] Production of a bill by the acceptor is not *prima facie* evidence of his having paid it, unless it is shown that it was in circulation after acceptance;[4] and if there be a receipt on the back of the bill, it must be shown to be in the handwriting of a person authorized to receive payment.[5]

SECTION VII.

WHEN RIGHT OF ACTION ACCRUES.

§ 1207. Whether or not suit may be instituted against the maker and indorsers of a note upon the last day of grace is a question upon which the authorities "are like Swiss troops, fighting on both sides," it being contended by some that the maker has the whole of the last day of grace to make payment, and that, as the law knows no fraction of a day, suit cannot be instituted against him until the last day of grace has entirely elapsed. In respect to the indorser, it has also been held that suit cannot be instituted against him until sufficient time has elapsed for him to be in actual receipt of notice. While, on the other hand, it is confidently, and, as we think, justly, asserted that after demand and refusal on the last day of grace, action may be commenced

[1] Taylor v. Higgins, 3 East, 169; Bullock v. Lloyd, 2 Car. & P. 119; Chilton v. Whippin, 3 Wils. 13.

[2] Bell v. Norwood, 7 La. 95; Chitty on Bills [*537], note. But see Bacchus v. Richmond, 5 Yerg. 109; 2 Parsons N. & B. 460.

[3] 2 Parsons N. & B. 455.

[4] Jewell v. Parr, 13 C. & B. 909.

[5] Pfiel v. Vanbatenberg, 2 Camp. 439.

against the maker; and after notice has been put in train to reach the indorser, it may also be commenced against him, whether he has actually received it or not.

§ 1208. *Action lies against maker on day of maturity, after demand and refusal.*—In the case of ordinary contracts to be performed upon a certain day, they are really solvable within that day; and as the promisor has the whole of the day for their performance, suit cannot be commenced until that day has passed.[1] But when the maker of a note, or the drawer or acceptor of a bill, makes it payable on a day certain, his contract is to pay it on demand on any part of that day, if made within reasonable hours.[2] The protest must be made on that day, which presupposes a default already made; and whether it be the last day of grace, or the day of maturity, when there is no grace, it is clear, upon principle, that as soon as payment is refused, the action may be commenced.

§ 1209. We are not aware of any decision which determines that the maker may be sued on the day of maturity, if the note is payable without grace, though the affirmative opinion has been expressed; but if payment has been demanded and refused, we should say that the action would lie, for the contract to pay on demand within reasonable

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[1] Webb v. Fairmaner, 3 Mees. & W. 473; Coleman v. Ewing, 4 Humph. 241.

[2] Leftly v. Mills, 4 Term. R. 170 (1791), Buller, J., said: "If the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established: they are payable at any time on the last day of grace, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say that demand should be postponed until midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded until sunset; and, if so, the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town." See also Greeley v. Thurston, 4 Greenl. 479; 1 Robinson's Practice (N. ed.) 442; Chitty on Bills (13th Am. ed.) [*481], 514.

hours is then broken, and, in the language of Parsons: "He has declared he will not pay, and can want further delay only to arrange the means of avoiding payment."[1] But there is still stronger reason to hold that the action may be commenced after demand and refusal on the last day of grace, for grace was originally matter of indulgence and courtesy, and not of contract, and it would seem unreasonable to extend indulgence after the maker has expressly refused to make the payment on the last day allowed him.[2] The weight of authority supports the view that suit may be commenced on the last day of grace against the maker;[3] but there are decisions of most respectable character to the contrary effect—that suit cannot be brought on the last day of grace,[4] nor even on the last day of maturity, when there is no grace.[5]

§ 1210. It must be observed that when a demand is necessary, it must be made upon the maker prior to institution of the suit on the day of maturity, or last day of grace.[6] In Massachusetts it was said by Shaw, C. J.: "The rule in regard to notes like the one in question is, that the note is payable at any time, on actual demand, on the last day of grace; and if such actual presentment and demand is so made, and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser.

[1] 2 Parsons N. & B. 461, 462. This is said by Shaw, C. J., in Staples v. Franklin Bank, 1 Mete. 43. See also Crenshaw v. M'Kiernan, Minor, 295.

[2] Staples v. Franklin Bank, 1 Mete. (Mass.) 43.

[3] Staples v. Franklin Bank, 1 Mete. (Mass.) 43; Shed v. Brett, 1 Pick. 401; N. E. Bank v. Lewis, 2 Pick. 125; Greeley v. Thurston, 4 Greenl. 479; Flint v. Rogers, 3 Shepl. 67; Estes v. Tower, 102 Mass. 66; Dennie v. Walker, 7 N. H. 201; Wilson v. Williman, 1 Nott & McC. 440; McKenzie v. Durant, 9 Rich. 61; Ammidown v. Woodman, 31 Me. 580; Coleman v. Ewing, 4 Humph. 241.

[4] Osborn v. Moncure, 3 Wend. 170 (1829). Suit commenced at 3 P. M. against the maker held premature. Reaffirmed in Smith v. Aylesworth, 40 Barb. 104, the only difference between the cases being, that, in the first, the note was payable generally, and, in the latter, at a bank. Walter v. Kirk, 14 Ill. 55; Wilcombe v. Dodge, 3 Cal. 260; Edwards on Bills, 525.

[5] Davis v. Eppinger, 18 Cal. 381; see Moore v. Holloman, 25 Tex. Supplement, 81.

[6] Greeley v. Thurston, 4 Greenl. 479; Veazie Bank v. Winn, 40 Me. 62.

But if no presentment or demand is made by the holder upon the maker, the latter is not in default to the end of the business day."[1] The demand must be made within reasonable hours on the day of maturity (or last day of grace, when there is grace), to authorize suit on that day; and, accordingly, where suit was brought immediately after a demand made at 8 A. M., it was held premature.[2]

§ 1211. *In respect to a due bill*, which is regarded in many States as a promissory note, it is payable immediately, and upon principle there is no doubt, we think, that in such States action may be brought immediately on the very day of its date. The due bill is predicated upon, and evidences the fact that the debt is then due—not to be due on that day (which in ordinary contracts means the same as within that day), nor to be due in business hours of that day if demanded, as is the case with respect to negotiable paper which has a period of time to mature. It is true that the due bill could not be sued upon during that fractional part of the day preceding its making; but it does not follow that during the remainder of the day it is not mature for suit. For its very language and nature purport that it is instantly due; and as a breach of contract occurs by failure to pay it instantly, the creditor may sue instantly, indulgence for any time being mere matter of his discretion and pleasure. This view is sustained by well considered authorities,[3] though not without dissent.

When the note is payable at a bank, the maker has until the expiration of business hours to pay it in; and suit should not be commenced until their expiration. But right of action accrues as soon as they have expired, if payment were demanded and refused.[4]

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[1] Pierce v. Cate, 12 Cush. 190; Estes v. Tower, 102 Mass. 66, Corey, J., explaining Butler v. Kimball, 5 Metc. 94, where the writ was issued after sunset on the last day of grace, but not delivered to the officer until the next day.

[2] Lunt v. Adams, 5 Shepl. 230.

[3] Cammer v. Harrison, 2 McCord (S. C.), 246; Dews v. Eastham, 2 Yerg. 403; Hill v. Henry, 17 Ohio, 9; see Fields v. Nickerson, 13 Mass. 130; 3 Parsons on Contracts, 91.

[4] See *ante*, § 1209.

§ 1212. *Action lies against indorser as soon as notice is put in train of transmission.*—In respect to the indorser, it has been held in a number of cases that suit against him cannot be commenced until time has elapsed for notice to be actually received by him, upon the theory that the holder's title is not complete until the indorser is actually notified that he is looked to for payment, or at least that time for him to receive such notice has transpired.[1] But this is a misconception, as we think, of the law of notice. The holder must exercise due diligence to give the indorser notice. That duty is fulfilled when he puts it in train to reach him, by sending it to his business or dwelling-house, or depositing it in the post-office, as the case may be. And for him to be delayed until time for its actual reception had gone by would subject him to the hazards, vexations and uncertainties of various circumstances which do not legitimately enter into the consideration of the indorser's liability.[2]

But in suits commenced on the last day of grace against an indorser, the plaintiff must prove that before the writ was sued out notice was deposited in the post-office, when he lives in a different place, or sent to his residence or place of

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[1] Smith v. Bank of Washington, 5 Serg. & R. 318 (1819), where notice to an indorser of a note was put in the post-office on the 13th, and by due course of mail could not reach him before the 19th. *Held*, that suit commenced on the 16th was premature. Bevan v. Eldridge, 2 Miles, 353 (1840); Wiggle v. Thomasson, 11 Sm. & M. 452; McFarland v. Pico, 8 Cal. 626; Castrique v. Bernabo, 6 Q. B. 498 (1844).

[2] Bayley on Bills, chap. ix, sec. i, 217; Shed v. Brett, 1 Pick. 401, Shaw, C. J., saying: "It would be mischievous to decide otherwise; for every plaintiff's right of action would commence at different times according to the distance of the party sued; and the time of suing must be conjectured, as it cannot be known when the notice will be actually received. Besides, if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance; for the holder must wait until his letter is received, and for a reasonable time afterward 'for the party to come and pay the money.' Who would take a bill or note remitted from New Orleans if this doctrine be correct? And if the parties liable be beyond the sea, such instruments would be mere waste paper." N. E. Bank v. Lewis, 2 Pick. 125; Greeley v. Thurston, 4 Greenl. 479; City Bank v. Cutter, 3 Pick. 414; Boston Bank v. Hodges, 9 Pick. 420; Dennie v. Walker, 7 N. H. 201; Manchester Bank v. Fellows, 8 Fost. 302.

business when he lives in the same.[1] If the notice precedes the suit ever so short a time, it suffices;[2] but if it does not, it seems the irregularity cannot be cured by the sending and reception of notice afterwards.[3]

§ 1213. When a bill is dishonored for non-acceptance, right of action accrues at once against drawer,[4] and also against the indorsers[5] as soon as the protest is made and notice put in train to reach the party, without waiting for the maturity of the bill. And if a note be payable in respect to principal or interest, in installments, action will lie for each installment as it falls due.[6]

SECTION VIII.

WHEN RIGHT OF ACTION EXPIRES.

§ 1214. At common law, when once a right of action accrued, it was immortal. But the disadvantages of permitting remedies to be sought at remote periods from the time the transactions occurred, and the desirability of having settlements while evidence was readily obtainable, led at an early date to the adoption of statutes fixing a limitation to actions. As early as A. D. 1270, an act was passed relating to limitation of actions concerning real estate; but personal property and especially choses in action, were at that time of so little consequence, that no limitation of personal actions was prescribed until 1623. In this modern period, choses in action constitute a vast portion of the property of the country; and the time at which the right to reduce them into posses-

[1] Manchester Bank v. Fellows, 8 Fost. 302.

[2] N E. Bank v. Lewis, 2 Pick. 125.

[3] Ibid.; New England Bank v. Lewis, 8 Pick. 113, where it is held that if the first action, commenced without first sending notice, be prosecuted to judgment, it is no bar to a second action. In an earlier case it was not thought objectionable that the action was commenced before notice was sent. Stanton v. Blossom, 14 Mass 116; Bayley on Bills, chap. ix, sec. 1.

[4] Robinson v. Ames, 20 Johns. 146.

[5] Lenox v. Cook, 8 Mass. 460; Ballingalls v. Gloster, 3 East, 481.

[6] Tucker v. Randall, 2 Mass. 283; Cooley v. Rose, 3 Mass. 221.

sion expires is a matter of prime importance. It is to be observed, in the first place, that statutes of limitation do not destroy the debt, but only bar the remedy. Therefore they must be specially pleaded, and cannot be given in evidence under a general issue.[1] And as they do not enter into the essence of the contract, they must be regulated entirely by the laws of the country where suit is brought.[2]

§ 1215. The statute of limitations begins to run from the very day the right of action accrues. Thus upon a bill or note payable at so many days from the date, it begins to run from the day of payment, and not from the day of date, but the day of maturity is excluded in the computation of time. If payable at sight, the statute runs from sight. If so many days after sight, or after certain events, then from the time named after sight, or after the events have happened.[3] If the instrument be payable on demand, the statute begins to run immediately as payment might be immediately demanded, or suit brought without any previous demand.[4] But if payable at a certain time after demand,[5] or after notice,[6] an actual demand must be made, or notice given, in order to fix the period of maturity when the statute commences.

SECTION IX.

EVIDENCE.

§ 1216. Under the various titles which have been already discussed, the general principles of evidence touching them respectively have been stated. And within the scope of this volume, which confines itself more particularly to the questions which peculiarly concern negotiable instruments, but little more remains to be said. The rule of the common law that a party interested should not testify in his own be-

[1] Chapple v. Durston, 1 C. & J. 1.
[2] See *ante*, § 884, vol. 1.
[3] Byles (Sharwood's ed.) [*331], 499; 1 Robinson's Practice (new ed.) 425.
[4] Wheeler v. Warner, 47 N. Y. 519; Herrick v. Woolverton, 41 N. Y. 581.
[5] Little v. Blunt, 9 Pick. 488; Wenman v. Mohawk Ins. Co. 13 Wend. 267.
[6] Clayton v. Gosling, 5 B. & C. 360 (11 E. C. L. R.)

half has been generally abrogated in the United States by statute; and the question of competency of witnesses must be solved in the several States where it arises accordingly as they have continued or modified the common law rule.

§ 1217. At one time there prevailed in England a peculiar rule of evidence respecting written instruments, that no party thereto should be permitted to impeach their validity. And in a leading case, where the indorser of a note was offered to prove it usurious, his testimony was held illegal, Lord Mansfield saying: "It is of consequence to mankind that no person shall hang out false colors to deceive them by first affixing his signature to a paper and afterwards giving testimony to invalidate it."[1] But it was subsequently overruled.[2] The United States Supreme Court has, however, adopted it in so far as it applies to negotiable instruments,[3] and so also have some of the State courts.[4] But the better opinion is, that negotiable instruments enjoy no immunity from the general doctrines of evidence, and that any party to a written contract, negotiable or otherwise, is competent to testify as to its invalidity.[5]

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[1] Walton v. Shelly, 1 Term R. 296.

[2] Jordaine v. Lasbrooke, 7 T. R. 601; Rich v. Topping, 3 T. R. 27.

[3] Scott v. Lloyd, 12 Pet. 145; U. S. v. Leffler, 11 Pet. 86; Bank of Metropolis v. Jones, 8 Pet. 12; Bank U. S. v. Dunn, 6 Pet. 51; Saltmarsh v. Tuthill, 13 How. 229; Henderson v. Anderson, 3 Id. 73. The United States Supreme Court held, in Bank U. S. v. Dunn, 6 Pet. 57, that "it is a well settled principle that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate," applying it to the case of an indorser. In Bank of Metropolis v. Jones, 8 Pet. 12, it was held that the drawer of a note is equally incompetent to prove facts which tend to discharge the indorser. In Henderson v. Anderson, 3 How. 73, an effort to overthrow these decisions proved unavailing; and in Saltmarsh v. Tuthill, 13 How. 229, it was held that a party to negotiable paper was as incompetent to prove facts which, taken in connection with others, would invalidate it, as to prove such as would of themselves invalidate it. The rule of exclusion, however, is limited by the Supreme Court to negotiable paper, and is not applied to other securities. U. S. v. Lefler, 11 Pet. 86.

[4] Gaul v. Willis, 26 Penn. St. 259; Lincoln v. Fitch, 42 Me. 456; Webster v. Vickers, 2 Scam. 295; Drake v. Henly, Walk. 541; Rohrer v. Morningstar, 18 Ohio, 579; Strang v. Wilson, 1 Mor. (Iowa), 84; Smithwich v. Anderson, 2 Swan, 573, (overruling Stump v. Napier, 2 Yerg. 35); Shamburgh v. Commagere, 10 Mart. 139; Dewey v. Warriner, 71 Ill. 198.

[5] Taylor v. Beck, 3 Rand. 316; Baring v. Reeder, 4 Hen. & M. 424; Orr v.

The rule of exclusion, where applied, is generally limited to negotiable securities indorsed and put in circulation before maturity or dishonor.[1] In a recent decision, the United States Supreme Court has given its concurrence in the doctrine that the rule of exclusion applies: "only to a case where a man, by putting his name to a negotiable security, had given currency and credit to it; and does not apply to a case between the original parties, where the paper has not been put into circulation, and each of the parties was cognizant of all the facts."[2]

§ 1218. The identity of each party to the instrument must be proved, and this requisition is satisfied by proof that the party has the same Christian and surname.[3] The inconvenience of the contrary doctrine, which obtained in some cases, led to its being overruled. "The transactions of the world could not go on if such an objection were to prevail," is the language of Lord Denman, in answer to objection to the sufficiency of such proof.[4] Further evidence of identity may be required when the name is a very common one in the country;[5] and so, perhaps, if the party be a marksman.[6] Where the difference between the name of the payee and indorser consists only in the insertion of a middle initial, it will be presumed that they are the same person.[7] But the

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Lacey, 2 Doug. (Mich.) 239; Ringgold v. Tyson, 3 Har. & J. 172; Jackson v. Packer, 13 Conn. 342; Gorham v. Carroll, 3 Littell, 221; Haines v. Dennett, 11 N. Hamp. 180; Freeman v. Britton, 2 Har. 191; St. John v. McConnell, 19 Mo. 38; Stafford v. Rice, 5 Cow. 23; Bank of Utica v. Hillard, Id. 153 (overruling Winton v. Saidler, 3 Johns. Cas. 185); Griffin v. Harris, 9 Port. (Ala.) 225; Parsons v. Phipps, 4 Tex. 341; Peeker v. Sawyer, 24 Vt. 459; Guy v. Hull, 3 Murph. 150; Bank of Mo. v. Hull, 7 Mo. 273; Knight v. Packard, 3 McCord, 71.

[1] Parke v. Smith, 4 Watts & S. 287; Thayer v. Crossman, 1 Metc. 46, Shaw, C. J.; Smithwick v. Anderson, 2 Swan, 573.

[2] Davis v. Brown, 94 U. S. (4 Otto), 427, Field, J. See Fox v. Whitney, 16 Mass. 118.

[3] Greenshields v. Crawford, 9 M. & W. 314; Harrington v. Fry, Ryan & M. 90; Sewell v. Evans, 4 Q. B. 626; Roden v. Ryde, 4 Q. B. 629; Hamber v. Roberts, 7 C. B. 861; 2 Parsons N. & B. 479.

[4] Sewell v. Evans, 4 Q. B. 626.

[5] Jones v. Jones, 9 M. & W. 75.

[6] Whitelocke v. Musgrove, 1 Cromp. & M. 511; 3 Tyrw. 541; 2 Parsons N. & B. 479.

[7] Hunt v. Stewart, 7 Ala. 525.

same presumption does not apply as to the identity of the maker and indorser, although the names be identical.[1] Where a party signs by initials, it must be shown who they intended to signify.[2]

§ 1219. In many of the States proof of the signature of any party sued upon a bond, bill, note, or other evidence of debt is dispensed with by statute, unless put in issue by denial supported by affidavit, or in some other manner prescribed. Where no such statute applies, evidence of handwriting is the most usual mode of proof. Persons familiar with the parties' handwriting may testify as to their opinion of its genuineness. The witness is permitted in some jurisdictions to compare the signature with known genuine specimens of the party's handwriting, introduced for that purpose in order to form an opinion;[3] in others he is not.[4] In England, an expert was not by common law permitted to testify from comparison of signatures merely,[5] but by statute such evidence is now admissible.[6] Where genuine signatures are contained in papers which are in evidence, the jury is permitted to compare the contested signature with them.[7]

§ 1220. The admission of the party dispenses with further proof of his signature.[8] So a payment, or promise to pay dispenses with proof of signature[9] or of agent's authority.[10] And as a general rule, the admission of a fact obviates the

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[1] Curry v. Bank of Mobile, 8 Port. (Ala.) 360.

[2] Jones v. Turnour, 4 Car. & P. 204.

[3] Farmers' Bank v. Whitehill, 10 Serg. & R. 110; Lyon v. Lyman, 9 Conn. 55; Moody v. Rowell, 17 Pick. 490; Hammond's Case, 2 Greenl. 33.

[4] Rowt v. Kyle, 1 Leigh, 216; Jackson v. Phillips, 9 Cow. 94; Pope v. Askew, 1 Ired. 16. This is the English rule. Macferson v. Thoytes, Peake, 20; Brookhard v. Woodley, Id. 20; overruling Allesbrook v. Roach, 1 Esp. 351.

[5] Gurney v. Langlands, 5 B. & Ald. 330; Rex v. Cator, 4 Esp. 117.

[6] 17 & 18 Vict. 1854.

[7] Doe v. Suckermore, 5 A. & E. 703; Doe v. Newton, Id. 514.

[8] Hall v. Phelps, 2 Johns. 451.

[9] Helmsley v. Loader, 2 Camp. 450; Shaver v. Ehle, 16 Johns. 201.

[10] Linders v. Bradwell, 5 C. B. 583.

necessity of other proof thereof, or of any fact which is necessary to the existence of the fact admitted.

But an admission may be explained and shown to have been made under a mistake, it being *prima facie*, but not conclusive evidence. A written admission by an indorser that he received notice of dishonor, has been held not to estop him from showing that he made it under misapprehension or mistake as to the bill referred to, and that no notice had in fact been received.[1] The principle was well stated in an English case by Bayley, J.: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless another person has been induced to alter his condition by them."[2]

[1] Commercial Bank v. Clark, 28 Vt. 325.

[2] Heane v. Rogers, 9 Barn. & Cres. 577.

CHAPTER XXXVIII.

THE DISCHARGE OF BILLS AND NOTES BY PAYMENT.

SECTION 1.

NATURE OF PAYMENT.

§ 1221. By payment is meant the discharge of a contract to pay money by giving to the party entitled to receive it, the amount agreed to be paid by one of the parties who entered into the agreement. Payment is not a contract. It is the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment. A sale is altogether different. It is a contract which does not extinguish a bill or note, but continues it in circulation as a valid security against all parties. And it is necessary to constitute a transaction a sale that both parties should then expressly or impliedly agree, the one to sell, and the other to purchase the paper.[1] Whether the transaction is a purchase or a pay-

[1] Lancey v. Clark, 64 N. Y. 209; affi'g s. c. 8 N. Y. S. C. (3 Hun), 575; Eastman v. Plumer, 32 N. H. 238. In this case the defendant signed the note as surety for the maker. The note was indorsed in blank, and the indorsee called on the maker for payment. The latter paid and received it. In fact the money used in payment had been placed in the hands of the principal by a third party, who sent it to purchase the note through him as agent, which fact, however, was unknown to the holder. This third party sued the surety; but it was held that he could not recover, the transaction being regarded as a payment by the maker which extinguished the instrument. Perley, C. J., saying: "The contract of the defendant was to pay the note to Roby, the payee or order. By his indorsement in blank, Roby ordered the note to be paid to the indorsee, or to such other person as should become the holder of the note by transfer of the note from Roby. But the holder under Roby's indorsement has made no transfer of the note as an existing security. He has received the amount due on the note from the principal debtor, and given up the note to him as paid and discharged. Looking at the case, then, as a mere matter of contract, according to his original undertak-

ment, is a question for the jury where the facts are in dispute.[1]

Credit given by the drawee of a bill, or by a party to a bill or note, who is liable for its payment to the holder at his request is equivalent to payment.[2] But if a bill accepted for the drawer's accommodation be sent to bank for collection, and be credited to the holder at maturity, it has been held that the bank, as its holder, may sue the acceptor.[3] "Payment of a debt is not necessarily a payment of money; but that is payment which the parties contract shall be accepted as payment."[4]

§ 1222. When a party to the instrument produces the money and takes it in, he cannot show that he was acting as the secret agent of another, and convert that other into a purchaser.[5] And when a stranger calls upon the holder of an overdue note, inquires for it, asks if he is willing to receive the money upon it, and pays the amount due, and receives the paper, but declines to have it canceled, and says nothing about a purchase—the transaction amounts to a pay-

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ing on the note, the defendant has not bound himself to pay it to this plaintiff, because Roby, the payee, has never ordered the contents to be paid to him. The holder of the note was not bound to assign it. He might insist that the note should be paid and discharged before he delivered it out of his hand. If he transferred the note by delivery, his assignment would still be a contract involving certain liabilities on his part. He would, for instance, be held to warrant that the note was genuine. * * * This defendant was surety, and was interested that the note should be paid by the principal. The holder called on the principal to pay, and he came with the money, paid it over, and the note was given up to him by the holder, with the understanding on his part that it was paid and discharged. So far as the holder of the note and the surety had any information, the note was paid, and the surety was discharged, and had a right to rely on the transaction as a payment. But if the plaintiff can maintain this action, the surety might be called on to pay the debt at any time within six years after it fell due, in virtue of a secret arrangement between the plaintiff and the principal debtor, by which the principal would be enabled to deceive his surety with every appearance of having paid the debt, and so relieved the surety from his liability."

[1] Dougherty v. Deeney, 45 Iowa, 443. [2] Savage v. Merle, 5 Pick. 83.

[3] Pacific Bank v. Mitchell, 9 Metc. 297. But see Chapter XI, vol. 1, §§ 325 *et seq.*

[4] Huffmans v. Walker, 26 Gratt. 315, Christian, J.

[5] Eastman v. Plumer, 32 N. H. 238.

ment, and cannot be regarded as a sale, though the paper be payable to bearer. In such a case it was said in New York, by Welles, J.: "It is true he (the stranger) declined having it canceled; but that circumstance was not enough to overcome the presumption arising from the facts proved, that it was paid and extinguished. It does not prove a purchase, and unless it was purchased by Riley (the stranger), it was satisfied."[1]

In treating the subject of payment, we shall consider: (1) By whom and to whom payment may be made. (2) When payment may be made, and the effect of payment. (3) In what medium payment may be made. (4) Conditional and absolute payment; taking bill or note for or on account of debt. (5) Application of payment. (6) Payment *supra protest*, or for honor. And shall also consider (7) other discharges.

SECTION II.

WHO MAY MAKE PAYMENT.

§ 1223. Any party to a bill or note may pay it; and an indorser who has been discharged by failure of notice may still sue a prior indorser or other parties who were not discharged, because, although not compelled to pay it, he acquires the right of the holder from whom he took the instrument, or is remitted to his own rights as indorsee.[2] But it seems that if the indorser has another note given him to secure and indemnify him for his indorsement, and, not being notified, waives the defense, and voluntarily pays the bill or note, he cannot enforce the note given him as indemnity.[3] And a stranger has no right to pay or discharge the contract of another, and cannot pay a bill or note so as to acquire the rights of a holder, except *supra protest*, as hereinafter indi-

[1] Burr v. Smith, 21 Barb. 262.

[2] Ellsworth v. Brewer, 11 Pick. 316.

[3] Bachellor v. Priest, 12 Pick. 399.

cated.[1] But a stranger may always purchase a bill or note with the consent of the holder.

And if a stranger takes up a bill payable at a banker's, it is not necessarily a payment by the acceptor, for it may be a purchase of the bill which gives him a right to require payment of the acceptor and others liable.[2] A personal representative of an indorser cannot purchase,—he can only pay the note,—as the policy of the law forbids his speculating on the subject of his trust, for his own benefit.[3]

§ 1224. The indorser should assure himself before he makes payment that there were no laches in respect to presentment, protest, or notice, which operated a discharge of prior parties, as well as himself; for if the holder had no right to enforce payment against him or his antecedents, his unnecessary payment could not revive their liability, and, unless made under circumstances of fraud or mistake, which entitled him to recover the amount back from the holder, the loss would fall upon him.[4]

§ 1225. The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for if there is a forged indorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again.[5] But the maker or acceptor might recover back the money as paid under a mistake of fact.[6] When, however, the signature of the drawer is forged, should the drawee accept or pay the bill, he becomes absolutely bound, because it is his duty to know the drawer's handwriting; and if he pays the money he cannot recover

[1] Edwards on Bills, 535; see *post*, § 1254; Burton v. Slaughter, 26 Gratt. 919.

[2] Deacon v. Strodhart, 2 Man. & G. 317; Byles on Bills (Sharswood's ed.) [*216], 354.

[3] Burton v. Slaughter, 26 Grat. 919.

[4] Roscoe v. Hardy, 12 East, 434; Turner v. Leech, 4 Barn. & Ald. 451.

[5] Smith v. Chester, 1 Term R. 654; Canal Bank v. Bank of Albany, 1 Hill, 287; Goddard v. Merchant's Bank, 2 Sandf. 247.

[6] See Chapter XLII, on Forgery, Section IV.

it back.[1] But acceptance does not admit the signature of the drawer as indorser also;[2] nor the authority of an agent to indorse a bill drawn by him as agent of the drawer.[3] If an indorser pays a bill or note upon which there is a prior forged indorsement, he cannot recover back the amount, because his indorsement was in itself, a warranty that the prior indorsements were genuine.[4] The payor should also satisfy himself of the identity of the holder; for he cannot defend himself against the real payee by showing that he paid the amount of the bill or note to another person of the same name, in good faith and in the usual course of business.[5]

§ 1226. *Payments under mistake.*—It is a general principle that money paid with knowledge of facts, but under a mistake of law cannot be recovered back.[6] But a party paying money under a mistake of the real facts may recover it back. Therefore, where a bank paid a post-dated check to a holder who knew that the drawer was insolvent, and that the drawee had no funds, but was in expectation of them that day, and none were received by the bank, it was held that the amount might be recovered back.[7] So an indorser, discharged by laches, who pays a bill to the holder under a misrepresentation of facts may recover back the amount.[8]

§ 1227. *Vouchers of payment.*—The party making payment should insist on the presentment of the paper by the party demanding payment, in order to make sure that it is at the time in his possession, and not outstanding in another. And if at the time he makes payment it is outstanding, and held by another, he may be compelled to pay it again.[9] The

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[1] Smith v. Mercer, 6 Taunt. 76; Price v. Neal, 3 Burr. 1354; Bank U. S. v. Bank of Georgia, 10 Wheat. 333.

[2] Robinson v. Yarrow, 7 Taunt. 455. See *ante*, vol. 1, §§ 538 *et seq.*

[3] Story on Bills, § 412; *ante*, vol. 1, § 539.

[4] See Chapter XXI, vol. 1, § 672.

[5] Graves v. American Exchange Bank, 17 N. Y. 205.

[6] Adams v. Reeves, 68 N. C. 134.

[7] Martin v. Morgan, 3 Moore, 635; see Adams v. Reeves, *supra*.

[8] Milnes v. Duncan, 6 B. & C. 671.

[9] Wheeler v. Guild, 20 Pick. 545; Davis v. Miller, 14 Grat. 1.

party making payment of the bill or note should also not fail to insist upon its being surrendered up, as a voucher that the party receiving the money was entitled to do so, and also that he has paid it to him.[1] The possession of the note by the maker is presumptive evidence that he has paid it;[2] and so, likewise, is the possession of the bill by the acceptor, provided it can be shown that it passed out of his hands after he accepted it, though otherwise it would seem not.[3]

§ 1228. It is better also for the acceptor or maker to take a receipt for the money written upon the back of the bill or note, which at once advertises payment to every person who might subsequently come into possession of the instrument by accident or fraud; and as almost incontestable proof of the fact. And it seems that such a receipt may be claimed by the party making payment;[4] and he is certainly entitled to demand the surrender of the instrument.[5] "The acceptor

[1] See *post*, § 1228, Otisfield v. Mayberry, 63 Me. 197 (1874), Appleton, C. J., saying: "The maker of a note has a right to its possession upon payment. In his hands it is evidence of such payment. In the hands of a stranger it is *prima facie* evidence of indebtedness. If a suit is brought it imposes upon the maker the necessity of a defense—the procurement of testimony—the employment of counsel, and the delay, expense and vexation of litigation. The possession of it by the maker is of importance to him. The conversion of it by another may become a source of indefinite injury. Accordingly it has been held in this State in Neal v. Hanson, 60 Me. 84; in Vermont in Buck v. Kent, 3 Vt. 99; Pierce v. Gilson, 9 Vt. 216; and in Spencer v. Dearth, 43 Vt. 98; and in New Hampshire in Stone v. Clough, 41 N. H. 290, that trover may be maintained by the maker against the payee for the conversion or wrongful withholding of his paid promissory note."

[2] Dugan v. U. S. 3 Wheat. 172; overruling Welch v. Lindo, 7 Cranch, 159; Norris v. Badger, 6 Cow. 449; Brinkley v. Going, 1 Breese, 288; Story on Notes, § 452; 2 Parsons N. & B. 220.

[3] Pfiel v. Vanbatenberg, 2 Camp. 439, Lord Ellenborough saying: "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee with his name upon them as acceptor. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment." Barring v. Clark, 19 Pick. 220; Chitty (13th Am. ed.) [*424], 478.

[4] Chitty on Bills (13th Am. ed.) [*423], 477; Story on Notes, § 422; Edwards on Bills, 576; Thomson, 265.

[5] Crandall v. Schroeppel, 1 Hun, 558 (8 N. Y. S. C. R.); 4 Thomp. &c. 78;

paying the bill," says Lord Tenterden, "has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto*, in his account with the drawer.[1] If it remain in the hands of the holder it may prove fatal to the defendant, as in a doubtful case its possession by the plaintiff would turn the scale in his favor.[2] But the debtor can impose no condition to his payment. And therefore where under the English stamp act it was provided that the person from whom the money is due may provide the stamp, and on payment require the receiver to give him a receipt, and pay him the amount of the stamp duty, and if the receiver refuses he becomes liable to a penalty of ten pounds, it was held, that under this statute a plea of tender was not sustained by proof that the defendant took a sum of money out of his pocket, and said to the plaintiff: "If you will give me a stamped receipt I will pay you the money."[3]

§ 1229. When an indorser makes payment it is especially desirable that he should take a receipt, as well as require delivery of the instrument;[4] and in England an indorser, whose name was on a bill which had passed to several subsequent indorsees, was nonsuited in an action upon the bill which he claimed to have paid, because he produced no receipt and no extraneous proof of payment.[5] But now the mere possession of the instrument would be, in such a case, sufficient evidence of payment and ground of recovery.[6] And

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Davis v. Miller, 14 Grat. 1; Moses v. True, 21 Grat. 556; Hansard v. Robinson, 7 B. & C. 90; Otisfield v. Mayberry, 63 Maine, 197; *ante*, § 1227; Wheeler v. Guild, 20 Pick. 545; Freeman v. Boynton, 7 Mass. 486; 1 Parsons N. & B. 230, note; 2 Parsons N. & B. 215; Byles (Sharswood's ed.) [*217, 218], 357, 364; Story on Notes, § 422; Thomson on Bills, 265; Edwards, 576. [It has been said otherwise in Massachusetts; a doubt has been intimated. Baker v. Wheaton, 5 Mass. 509.]

[1] Hansard v. Robinson, 7 B. & C. 90.

[2] Brombridge v. Osborne, 1 Stark. 374.

[3] Laing v. Meader, 1 Car. & P. 257, Abbott, C. J., said: "This is no proof of a tender; the offer of the money must be unconditional."

[4] Story on Notes, § 452.

[5] Mendez v. Carreroon, 1 Ld. Raym. 742 (1701).

[6] Dugan v. U. S. 3 Wheat. 172; Warren v. Gilman, 15 Me. 70; Bowie v. Du-

the presumption of payment arising from possession of the instrument may in any case be rebutted.[1] If there be a general receipt of payment on the back of the instrument, it will be presumed that it was made by the maker or acceptor, who was primarily liable;[2] and this presumption would exist even when the drawer had possession and sued the acceptor upon a bill indorsed with such a receipt.[3] But a receipt, while it is an admission, is not so conclusive between the parties (though it is as to a third party who has acted on the faith of it) as to exclude explanation by parol evidence.[4] Evidence of a party's pecuniary ability to pay for many years after judgment against him, does not tend to show that he has paid, and is considered immaterial;[5] and even when coupled with proof of the pecuniary distress of the holder of a note, the pecuniary ability of the party sued has been held irrelevant, and inadmissible as tending to prove payment.[6] But similar circumstances have been deemed sufficient to require proof of the holder that he gave value.[7]

SECTION III.

TO WHOM PAYMENT MAY BE MADE.

§ 1230. Payment of a bill or note should be made to the legal owner or holder thereof, or some one authorized by him to receive it. If it be payable to bearer or indorsed in blank, any person having it in possession may be presumed to be entitled to receive payment, unless the payor have notice to the contrary; and a payment to such person will

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vall, 1 Gill & J. 175; Bond v. Storrs, 13 Conn. 412; Campbell v. Humphreys, 2 Seam. 478; Brinkley v. Going, 1 Breese, 228; Story on Notes, § 452. See vol. 1, § 576, and vol. 2, §§ 1198, 1230.

[1] Fellows v. Cress, 5 Blackf. 536.

[2] Scholey v. Walsby, Peake Cas. 24; Jones v. Fort, 9 B. & C. 764.

[3] Ibid.

[4] Scholey v. Walsby, *supra;* Chitty on Bills (13th Am. ed.) 478.

[5] Daby v. Ericsson, 45 N. Y. 786.

[6] Alexander v. Dutcher, 14 N. Y. S. C. (7 Hun), 440.

[7] Duerson v. Alsop, 27 Grat. 229.

be valid, although he may be a thief, finder or fraudulent holder.[1] If it be payable to a particular party or order, and unindorsed by him, it has been held that a payment to any person in actual possession will still be valid, because although he may have no legal title, he may be the agent of the actual owner.[2] But this doctrine, it seems to us, goes too far. Such person in actual possession may perhaps be presumed to be agent of the holder, *prima facie*. But even this is doubtful, for nothing is more common than to indorse negotiable instruments to agents for collection; and if the bill or note be unindorsed in blank, or specially to the party having it in possession, it might be that the owner had withheld his indorsement for the very purpose of preventing its collection by a person not entitled to receive the money; and if this were so, the presumption of agency (if, indeed, it be at all admitted) would be rebutted.[3]

The contrary doctrine destroys a great and salutary safeguard to the rights of proprietors of negotiable instruments, and to a large degree breaks down the distinction between those payable to order and those payable to bearer. Payment may be safely made to one who is a special indorsee, although there may be subsequent uncanceled indorsements of himself and others on the paper.[4] If the holder held and

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[1] Mauran v. Lamb, 7 Cow. 174; Bachellor v. Priest, 12 Pick. 406; Bank U. S. v. U. S. 2 How. 711; Dugan v. U. S. 2 Wheat. 172; Bank of Utica v. Smith, 18 Johns. 230; Adams v. Oakes, 6 Car. & P. 70; Owen v. Barrow, 4 Bos. & P. 101; Goodman v. Harvey, 4 Ad. & E. 870; Story on Bills, § 415; Story on Notes, § 454; Edwards on Bills, 537; Merritt v. N. Y. &c. R. R. 21 N. Y. S. C. (14 Hun), 324.

[2] Bachellor v. Priest, 12 Pick. 406. The instrument was indorsed: "Pay to J. Flewelling, Esq., Treasurer." Presentment was made by Dunscombe, and payment to him held good.

[3] Porter v. Cushman, 19 Ill. 572; see Chapter XX, vol. 1, §§ 573, 574.

[4] Dugan v. U. S. 3 Wheat. 172; see Chapter XX, on Presentment for Payment, vol. 1, § 576. In the case of Mendez v. Carreroon, 1 Ld. Raym. 742, G., the fourth indorsee of a bill, brought suit and recovered of the first indorser, D. D. then sued B., the drawer, and though he produced the bill and protest, yet because he could not produce a receipt for the money paid by him to G., upon the protest, as was the custom according to the testimony of several merchants, he was nonsuited. This is no longer law. Chitty, Jr. 216. See, also, *ante*, § 1198.

exhibited extraneous evidence of his right to receive payment, it would suffice, without special indorsement to him, or indorsement in blank.[1]

§ 1231. Payment may be made to the assignee of a bankrupt;[2] the representative of a dead owner;[3] to the guardian of an infant or insane person;[4] or the husband whose wife is payee.[5] And if the payor should pay the bankrupt, with knowledge that the amount was due his assignee;[6] or the ward in person, instead of his guardian;[7] or the married woman, after knowledge of her marriage, without concurrence of her husband, it would be invalid.[8] If the instrument be payable to A. for the use of B., payment must be made to A.[9]

Payment must also be made to a member of a firm; the duly constituted officer of a corporation; the receiver of a court, or any ministerial officer authorized by law to collect the money.

§ 1232. It seems that if a single woman who holds a bill or note, marries, payment to her after marriage will not exonerate the acceptor, even if he does not know of her marriage;[10] and that, if the holder make payment to his former agent, without knowledge of revocation by death of the principal, it will not be valid.[11]

SECTION IV.

WHEN PAYMENT MAY BE MADE.

§ 1233. Payment can only be made before maturity by consent of both debtor and creditor.[12] And it can only be

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[1] Pease v. Warren, 29 Mich. 9.
[2] Bayley on Bills (2d Am. ed.) 320; 2 Parsons N. & B. 211.
[3] Ibid.; Chitty [*393], 444.
[4] Ibid.
[5] Chitty [*393–4], 444.
[6] Chitty on Bills, 447; Story on Bills, § 413; Kitchen v. Bartsch, 7 East, 53.
[7] Leonard v. Leonard, 14 Pick. 280; White v. Palmer, 4 Mass. 147.
[8] Barlow v. Bishop, 1 East, 432.
[9] Cramlington v. Evans, 2 Vent. 307.
[10] Story on Bills, § 413.
[11] Story on Bills, § 413.
[12] Ebersole v. Ridding, 22 Ind. 232.

made with perfect safety at or after the maturity of the instrument, unless the payor receives it in his hands and cancels it; for a payment before maturity is not in the usual course of business; and should the bill or note afterward, and before maturity, reach the hands of a *bona fide* holder for value, without notice, such holder could enforce a second payment.[1] If paid, however, at maturity to the holder, the case is different. The instrument is not only extinguished, but should the holder fail to deliver it up, and transfer it to another party, such party would receive it with notice upon its face that it was overdue, and he could acquire no better right or title than his transferrer; and the plea that it was paid before the transfer would be available against him. Still, the payor, in making payment after maturity, must be sure that it is made to the then holder. For, if it should have been transferred after maturity, and before payment, to a third party, a payment to the transferrer would be invalid, and the transferee holding the instrument could himself enforce payment.[2]

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[1] Burbridge v. Manners, 2 Camp. 193; Morley v. Culverwell, 7 M. & W. 174; Da Silva v. Fuller, Chitty [*395], 446; Wheeler v. Guild, 20 Pick. 545. In this case it appeared W., the indorsee in blank of a note, delivered it to B. & G., attorneys in partnerships, as collateral security for certain debts due them and others, and the note was placed among the private papers of G., by whom the business was transacted. The debts for which the note was transferred as collateral security were paid, and afterwards, but before the note matured, the maker paid the amount to B., and took a receipt from him in his own name alone. The note was not delivered to the maker, being with the private papers of G. It was held that, as the note was not delivered up, and as the right of B. & G. to transfer and collect it ceased upon payment of the debts for which it was pledged, and as the note was paid before maturity, the payment to B. did not operate as a discharge of the note, and that the plaintiff could recover of the maker. Ayer v. Hutchinson, 4 Mass. 372; Griswold v. Davis, 31 Vt. 390; Story on Bills, § 415; Thomson on Bills, 246; Byles (Sharswood's ed.) [*217], 356; Chitty (13th Am. ed.) [*395, 397], 446-8. But the holder must be without notice of payment. White v. Kebling, 11 Johns. 128; Edwards on Bills, 548, 549. If a party lose a draft, and it be paid by the bank before due, the loser may require it to be paid again. Da Silva v. Fuller, *supra*.

[2] In Davis v. Miller, 14 Gratt. 1, it appeared that suit was brought by Miller & Mayhew against Davis on his promissory note to E. L. Fant & Co., who had indorsed it to them on August 6th, 1850, after it had fallen due and been pro-

§ 1234. The debtor may, of course, pay the bill or note to any one who is the holder under an indorsement to himself personally, or an indorsement in blank, at any time before maturity, provided the holder consents to receive payment. But if the debtor, from the prospect of some benefit by the rate of exchange, or otherwise, should offer payment before the term arrives, the creditor is not bound to take it, since the term of payment is a condition of the bill or note fixed equally for behoof of both parties.[1]

§ 1235. Payment may be demanded at any time after the commencement of business hours on the day of the maturity of the bill or note. And if payment be then refused,[2] or if the house at which the instrument is payable be shut up, and no one is there to answer,[3] it may be treated as dis-

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tested for non-payment. Miller & Mayhew sent Davis notice of the transfer to them on the 9th of August, but he did not receive it until afterward; and he had already on that day paid the note and taken the receipt of Fant & Co. for the money. This payment was held no defense to the action. Moncure, J., rendering an elaborate and able opinion, in the course of which he cited with approval the *obiter dictum* of Shaw, C. J., in Baxter v. Little, 6 Metc. R. 7, and adverting to the circumstance that no decision had been referred to holding that it was not a good defense, he added: "On the other hand, however, it may be answered that no case can be found in which it has been decided or even said that payment to an indorser after an indorsement is a good defense against the indorsee. That no decision can be found the other way is well accounted for by the fact that payment of a negotiable note is very rarely made without taking in the note, or having the payment, if partial, indorsed thereon, and no occasion has therefore occurred for a decision of the question. That no such occasion has occurred is itself an argument in favor of the defendants in error. * * * There is, at least, as much reason in holding the maker of a note responsible for want of caution in making a payment, as for holding a purchaser responsible for want of caution in making a purchase. Indeed, there is more. For due caution will always protect the former against an improper payment; while the greatest caution may not protect the latter against an improper purchase. The former is always safe in making payment to the legal holder of the note, which he may thereupon require to be produced and surrendered to him; while the latter is often deceived by a false possession, and must at his peril look to the title, which may be separate from the possession." See, also, Coppman v. Bank of Kentucky, 41 Miss. 212; Elgin v. Hill, 27 Cal. 373.

[1] Forbes, 108; Thomson on Bills, 247.

[2] *Ex parte* Moline, 1 Rose, 303; Burbridge v. Manners, 1 Camp. 193; Haynes v. Birks, 3 B. & P. 599; Chitty on Bills (13th Am. ed.) [*397], 448; Edwards on Bills, 549; Byles (Sharswood's ed.) [*216], 355.

[3] Hine v. Allely, 4 B. & Ad. 624.

honored, notice given, and resort taken upon the drawer and indorsers. But the maker or acceptor has the whole day in which he is privileged to make payment, and though he should in the course of the day refuse payment, yet if he subsequently on the same day makes payment, it is good, and the notice of dishonor becomes of no avail.[1]

A payment after action brought will not prevent the holder from proceeding for his costs, unless they be included or released.[2]

Payment to a wrong party of a bill or note long dishonored, or of a check long after it was drawn, or of a check which had been torn into pieces and pasted together, does not discharge the payor,[3] for the circumstances convey reasonable notice that the instrument has been canceled.[4]

SECTION V.

THE EFFECT OF PAYMENT, AND WHO MAY REISSUE A BILL OR NOTE.

§ 1236. The maker of a note and the acceptor of a bill are the principal parties bound for its payment, the drawer and indorsers being liable as sureties; and hence a payment by the maker or acceptor discharges the drawer or indorsers and cancels the instrument and the obligation.[5] When the bill is accepted for accommodation of the drawer, the latter is bound to refund the amount, should it be paid by the acceptor, and satisfy him for all damages.[6] But the acceptor cannot sue him on the bill which is his own obligation, canceled by his payment,[7] though it is an item of evidence to

[1] Hartley v. Case, 1 C. & P. 555; 4 B. & C. 339.

[2] Toms v. Powell, 6 Esp. 40; Goodwin v. Creamer, 16 E. L. & Eq. 90; Kemp v. Balls, 28 Id. 498; 10 Exch. 607; Tarin v. Morris, 2 Dall. 115; Thame v. Boast, 12 Ad. & El. N. S. 808; Story on Bills (Bennett's ed.), § 423 *a*.

[3] Scholey v. Ramsbottom, 2 Camp. 485.

[4] Byles on Bills (Sharswood's ed.) [*214], 352.

[5] Suydam v. Westfall, 2 Den. 205; Eastman v. Plumer, 32 N. H. 238.

[6] Baker v. Martin, 3 Barb. 634.

[7] See Chapter XXXVII, on Action; Griffith v. Reed, 21 Wend. 502.

show the amount on settlement with the drawer.[1] It has been held that where a bill was drawn by one person as principal, and another as surety, the undertaking of the latter is with the payee or subsequent holder that the bill shall be accepted and paid, but that he incurs no obligation to the drawee who accepts and pays it for accommodation.[2] But this doctrine has been overruled on the ground that all the parties signing a bill are responsible as for money paid at their request.[3]

§ 1237. If the drawer of a bill pay part of it to the holder, the better opinion is that the holder may nevertheless sue and recover of the acceptor the whole amount, in which case he would receive that portion already paid by the drawer or trustee for him, and would be liable to him, *pro tanto*, for money had and received to his use.[4] Even if the drawer has paid the whole amount to the holder, yet if he have left the bill in his possession, and he should sue the acceptor, it would be no defense as to him.[5] For while on the one hand it may be contended that payment by the drawer, who is a surety for the acceptor, is an entire extinguishment of the instrument, yet if this were so, the drawer himself could not sue the acceptor upon it, but would have to sue him for money paid at his request.[6] It is more correct to regard the payment as a mere extinguishment of the drawer's liability. And it cannot matter, nor be good ground of defense to the acceptor who is bound to pay the bill, and

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[1] Bank of Vergennes v. Cameron, 7 Barb. 143.

[2] Griffith v. Reed, 21 Wend. 502.

[3] Suydam v. Westfall, 4 Hill, 211; 2 Den. 205; Edwards on Bills, 534, 535; Story on Bills, § 420.

[4] Johnson v. Kennion, 2 Wils. 262; Walwyn v. St Quintin, 1 Bos. & Pul. 652; Jones v. Broadhurst, 9 C. B. 173, in which case the whole subject is elaborately and ably discussed; Callow v. Lawrence, 3 M. & S. 95; Hubbard v. Jackson, 1 M. & P. 11 (17 E. C. L. R.); Byles on Bills (Sharswood's ed.) 354; 2 Parsons N. & B. 218; Story on Bills, § 422; *contra*, Bacon v. Searles, 1 H. Bl. 88, now overruled.

[5] Jones v. Broadhurst, 9 C. B. 173; Thornton v. Maynard, 10 Com. Pl. L. R. 695; Moak's Eng. R. 522.

[6] 2 Parsons N. & B. 218, note *k*; Byles (Sharswood's ed.) [* 214], 353, note *k*.

may discharge that obligation by payment to any holder who sues. It seems, however, that if the acceptance were for accommodation, and the drawer accommodated were to pay the bill, it would operate as an absolute extinguishment, there being no person in existence entitled to receive the money of the acceptor.[1] In England where the drawer paid part of a bill and went into bankruptcy, the acceptor on being sued for the whole amount by the holder was sustained to the extent of the partial payment made in an equitable plea as set-off of an amount due him by the drawer,—the holder being regarded as suing as trustee for the drawer as to the part paid by him.[2]

§ 1238. As a bill or note when paid by the acceptor or maker is thereby utterly extinguished, it is clear that if he were to reissue it, and it were to pass into the hands of even a *bona fide* holder, he could not hold the drawer or indorsers liable, for its being overdue would in itself be sufficient notice of payment.[3] It is equally clear that if the last of several successive indorsers were to pay the bill or note to his indorsee, he could reissue the instrument with or without his own indorsement remaining upon it, and that all parties claiming under his second transfer could sue and recover from all prior parties who remain liable to him; and from him also if his indorsement were upon the instrument.[4] But differences of opinion have arisen as to the right of a drawer to reissue a bill. Thus, if A. were to draw a bill upon B., payable to the order of C., and C. were to indorse it to D. after its acceptance, and then A. were to pay it to D.—query arises whether or not A. could reissue the bill to E., so as to

[1] Lazarus v. Cowie, 3 Q. B. 459 (43 E. C. L. R.); see Walwyn v. St. Quintin, 1 Bos. & P. 652; Bacon v. Searles, 1 H. Bl. 88; see Redfield & Bigelow's Lead. Cas. 350, 351; Story on Bills, § 422; Byles on Bills (Sharswood's ed.) [*215], 354.

[2] Thornton v. Maynard, 10 Com. Pl. L. R. 695 (1875.)

[3] Gordon v. Wansey, 21 Cal. 77; Gardner v. Maynard, 7 Allen, 456.

[4] St. John v. Roberts, 31 N. Y. 441; French v. Jarvis, 29 Conn. 348; Kirksey v. Bates, 1 Ala. 303; Montgomery R. R. Co. v. Trebles, 44 Ala. 258. See Fenn v. Dugdale, 40 Mo. 63.

give him the right to sue the acceptor upon it. Clearly E. could not sue C., for C. was the surety of the drawer, and was discharged by the payment made by him. And there are two cases in which he could not sue the acceptor.

§ 1239. *First*, when the acceptance was for the drawer's accommodation; for in that case the acceptor was under no liability to the drawer when the latter reissued the bill. And, as after the bill became due, the drawer could only negotiate it subject to equitable defenses, the acceptor could defend himself on this ground.[1] An early case may be referred to as authority for this view. Brown drew the bill upon Robley, payable to Hodson or order, and it was accepted by Robley and indorsed by Hodson. Not being paid by the acceptor at maturity, Brown the drawer paid it and took it up with Hodson's indorsement remaining thereon. And then Brown gave the bill to Beck as security for money, not telling him whether or not there were effects in Robley's hands; and Beck sued Robley as acceptor. It was held that the action could not be maintained, on the ground, as found by the jury, that "the acceptor was discharged by Brown's taking up the bill, and that there was an end of its negotiability," from which it would seem that the bill was made for accommodation of the drawer.[2] So understood, this case is unassailable; and so it has been construed and approved.[3] It has been said to be "no longer law" by an English compiler,[4] but without assignment of reason or authority for the statement. And in Massachusetts it has been said that "it has never been overruled or denied."[5]

[1] Jones v. Broadhurst, 9 Com. B. 173.

[2] Beck v. Robley, 1 H. Bl. 89 n. (1774); approved in Gardner v. Maynard, 7 Allen, 456 (1863).

[3] Jones v. Broadhurst, 9 Com. B. 173; see opinion of Cresswell, J. But the fact that it was an accommodation bill is not noticed in Gardner v. Maynard, 7 Allen, 456. See Byles on Bills [*166], 230.

[4] Chitty, Jr., on Bills, vol. 1, p. 390.

[5] Gardner v. Maynard, 7 Allen, 457, Metcalf, J.

§ 1240. *Second.* The drawer could not reissue the bill if the name of any indorser to whom he himself was liable remained upon it. For in that event the holder could not trace title against the acceptor, the indorsements having been discharged. Besides, the indorser, whose name remains upon the bill, would be exposed to liability to a holder, and therefore such a bill is held to be not negotiable.[1] The same principle would apply to forbid the reissue of a bill or note by an intermediate indorser, when the names of subsequent indorsers remained upon it, the general doctrine being that a bill or note cannot be indorsed or negotiated after it has once been paid, if such indorsement or negotiation would make any of the parties liable apparently who have been already discharged.[2]

§ 1241. In all other cases a drawer or indorser may reissue the bill or note.[3] Thus, where A. drew a bill upon B., who accepted it, and it was payable to the drawer's order, and by him indorsed to C., and by C. to D., and on being dishonored by the acceptor was paid by the drawer to D., who struck out his own and C.'s indorsements, it was held that A. might reissue the bill, and the holder could recover against the acceptor.[4] In the event that the bill were drawn by A. payable to C.'s order, and C.'s indorsement were canceled, it might be contended that a holder could not trace

[1] Gardner v. Maynard, 7 Allen, 456 (1863); see also Beck v. Robley, 1 H. Bl. 89; Jones v. Broadhurst, 9 Com. B. 173.

[2] Gardner v. Maynard, 7 Allen, 457; Chitty on Bills (13th Am. ed.) [*224], 255; Story on Notes, § 180.

[3] French v. Jarvis, 29 Conn. 348.

[4] Callow v. Lawrence, 3 Maule & Sel. 95 (1814), Lord Ellenborough saying: "It does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers. In Beck v. Robley, if the bill had been negotiable it would have had the effect of rendering Hodson liable on his indorsement, which, in point of law, was discharged by Brown's taking up the bill. That, I think, is the distinction, and disposes of that case." The drawer of a bill who pays it to an indorsee may leave it in his hands to be sued upon by him for the drawer's benefit. Williams v. James, 15 Ad. & El. N. S. 499.

title against the acceptor. But if the bill were paid by the drawer upon C.'s order, the title would then be in him; and by virtue of his position, any holder under him, we should say, could recover.

§ 1242. It is to be observed that while after payment the parties thereby discharged cannot be bound by its reissue, still bills and notes may remain negotiable after payment, so far as respects the parties who shall knowingly negotiate the same afterwards, for in such a case the negotiation cannot prejudice any other persons, and will only charge themselves.[1] But the indorsement of a negotiable bill after its dishonor, has been held to be a new and independent contract, and in its effect between indorser and indorsee distinct from the negotiable character of such bill; so that if indorsed to a particular person by name, without adding the words "or order," or equivalent words of negotiability, he cannot transfer it by indorsement so as to enable his indorsee to sue upon it in his own name.[2]

It has been held that if an indorser who pays a bill, reissues it, he is bound by his first or second indorsement according to intention; if as one already fixed he need not have notice.[3]

§ 1243. Sometimes an agreement is made to "retire" a bill. It should be construed according to the circumstances of the case. The word "retire" is susceptible of various meanings according as it applies in various circumstances. "If the acceptor retires a bill, he takes it out of circulation—then the bill is paid; but if an indorser retires it, he only withdraws it from circulation so far as he himself is concerned, and may hold the bill with the same remedies as he would have had had he been called upon in due course, and paid the amount to his immediate indorsee. This is the

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[1] Hubbard v. Jackson, 4 Bing. 390; Callow v. Lawrence, 3 M. & S 95; Guild v. Eager, 17 Mass. 615; Mead v. Small, 2 Greenl. 207; Story on Bills, § 223.

[2] Leavitt v. Putnam, 1 Sandf. 199; Story on Bills (Bennett's ed.) 199.

[3] Montgomery R. R. Co. v. Trebles, 44 Ala. 258.

ordinary meaning of the word; and we think it was used in that sense in the letter in question."[1]

If a note be surrendered by mistake, the whole amount being supposed to have been paid, whereas only a part had been, the balance may be recovered.[2] But in the absence of fraud, illegality, or mistake, it could not be.[3]

SECTION VI.

IN WHAT MEDIUM PAYMENT MAY BE MADE.—THE LEGAL TENDER CASES.

§ 1244. The money to be paid is that which is current at the place where payment is to be made.[4] But in construing the terms of the bill or note, it is to be interpreted according to the meaning of the words used at the time when and the place where the instrument was drawn or made. And accordingly, if the coin which is expressly agreed to be paid be alloyed by the government between the time of contract and the time of payment, the debtor should be required to make good the full value of the coin at the time of the contract. And so, if the name of the coin be changed so as to apply to a lesser value, the amount to be paid should be estimated according to the value at the time of the drawing of the instrument, for payment in that coin then of higher value was contemplated.[5] On this sub-

[1] Elsom v. Denny, 25 E. L. & Eq. 423, Jervis, C. J.

[2] Banks v. Marshall, 23 Cal. 223.

[3] Kent v. Reynolds, 15 N. Y. S. C. (8 Hun), 559.

[4] Chitty on Bills (13th Am. ed.) [* 399], 450; Story on Bills, § 418; Williamson v. Smith, 1 Cold. 1.

[5] In the case of "The Mixed Monies," Sir John Davies Reports, a different view was taken. In a subsequent case, Da Costa v. Cole, Holt, 465; Skin, 272 (1688), it was held that a bill drawn in England, on Portugal, for 1,000 mille rees, could not be satisfied by tender of mille rees which had been depreciated twenty per cent. by the king of Portugal eight days after the bill was drawn. Holt, C. J., said: "This case differs from the case of Mixed Monies, for there the alteration was by the king of England, who has such a prerogative, and this shall bind his own subjects."

ject the authorities exhibit great contrariety of opinion.[1] We have simply stated the conclusions which seem to us just and right.[2]

§ 1245. The party bound to make payment has no right to do so in any other medium than that expressed on the face of the instrument—that is, he must make payment in money.[3] And an agent, holding the instrument for payment, can take nothing else but money.[4] Sometimes checks or drafts are offered by the debtor in discharge of the debt, and the effect of giving and receiving them is elsewhere considered.[5]

But where a bill or note is expressed to be payable "in currency" (in which case, however, it would not be negotiable), there is no specification of a particular value which is to be paid; but only a designation of quantity in nominal value. "One hundred dollars in currency" does not mean the value of one hundred gold dollars to be paid by as much currency as will amount to that value; but means "one hundred dollars of currency"—that is, one hundred currency dollars. Any currency in circulation at the time of payment would then satisfy the terms of the contract—would be the

[1] See Story's Conflict of Laws, §§ 313, 313 *a*, *et seq.*

[2] Sir William Grant, in the case of Pilkinton v. Commissioners of Claims, 2 Knapp, 17, states the view which we have adopted very clearly. In the course of his opinion, he said: "Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies' Reports. [The case of the 'Mixed Monies' above cited.] He takes the distinction that, if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed. But, he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for thirty shillings, the debtor may liberate himself from a debt of one pound ten shillings by paying a guinea, although he had borrowed the guinea when it was worth but twenty-one shillings."

[3] Story on Bills, § 419; Edwards on Bills, 550.

[4] Ibid. See Chapter XI, § 335, vol. 1.

[5] See Chapter XLIX, on Checks, Section VII.

identical thing contracted to be paid—and, however much depreciated, would be a good tender in discharge of the debt.[1]

§ 1246. *The legal tender cases.*—It is provided by the Constitution of the United States (art. I, sec. IX), that "No State shall coin money, emit bills of credit, or shall make anything but gold and silver coin a tender in payment of debts;" and thus any interference of the State governments with the money of the country is forestalled and prevented. It is also provided that Congress shall have power "to coin money and regulate the value thereof," but no power is conferred upon it to make anything but coined money "legal tender" in discharge of debts, nor is anything said on that subject. The Constitution, however, declares by art. X of its amendments, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." During the war between the Confederate States and the United States, and as a means of raising revenues for its prosecution, Congress, on the 25th day of February, 1863, passed an act providing for the issue of treasury notes, and declaring that they "should be receivable in payment of all taxes, internal duties, excises, debts and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

[1] Rucker v. Dearing, 18 Gratt. 438, Joynes, J.: "A contract for the payment of so many dollars in Confederate notes was a contract to pay so many dollars of Confederate notes, or so many Confederate dollars. The specification of dollars served only to measure the quantity of the notes, so that, in every such contract, the quantity of notes to be delivered was ascertained, though their value was uncertain. The contract was for quantity only, and not for value." Huston v. Noble, 4 J. J. Marsh. 130; David v. Phillips, 7 Mon. 632; McCord v. Ford, 3 Mon. 166; Chambers v. George, 5 Litt. 335; Dillard v. Evans, 4 Ark. 175; Trebilock v. Wilson, 12 Wall. 694; Taup v. Drew, 10 How. 218.

§ 1247. The United States Supreme Court has decided that where contracts were made before the passage of this act to pay certain amounts "in gold or silver coin," they were not affected by it; and according to its opinion and reasoning no contract, whether made before or after the passage of the act, expressed to be payable in coin or specie, can be satisfied by the tender of treasury notes. The result of the legal tender act is that there are now two descriptions of lawful money in use, both of which are legal tender in payment of debts. The statute denomination of both descriptions is dollars, but they are essentially unlike in nature. The one is coined out of a precious metal, and possesses an intrinsic value. The other is a promise of the United States to pay a coined dollar, and is without intrinsic value; and the two dollars differ in their purchasing value. When bills, notes, checks, or other contracts payable in coin are sued upon, judgments should be entered for coined dollars and parts of dollars; and when payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally without such specification.[1] No distinction is made as to the time

[1] Bronson v. Rodes, 7 Wall. 245 (1868); Butler v. Horwitz, Id. 259 (1868), contract to pay "£15 current money in Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each." Dewing v. Sears, 11 Wall. 379 (1870). Lease bearing yearly rent "of four ounces, two pennyweights, and twelve grains of pure gold in coined money." Strong, J., said: "Judgment should have been entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold."

Trebilock v. Wilson, 12 Wall. 687 (1871), Field, J., saying: "The note of the plaintiff is made payable, as already stated, in specie. The use of these terms n specie does not assimilate the note to an instrument in which the amount istated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles, or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms in specie are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or

when such contracts to pay gold may have been entered into, and the above views apply to contracts made payable in gold, entered into after the legal tender acts were passed, as well as these entered into before.[1] If the paper be payable "in gold coin or the equivalent thereof in United States legal tender notes," it has been held that a payment in legal tender notes, dollar for dollar, discharges it.[2]

§ 1248. In the first case that came before the United States Supreme Court in which the question of the constitutionality of the legal tender act was raised, it was declared that Congress had no power to make anything but coined money a legal tender in payment of debts, and that accordingly the note in suit, dated June 20th, 1860, and which was expressed to be payable in "dollars" on the February 20th, 1862, could not be discharged by a tender of treasury notes.[3] This decision, however, was subsequently overruled, the court in the mean time having been changed by the resignation of one member and the appointment of two new ones.[4] But this reversal of what was deemed a just judgment was made under

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silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms in currency, which are used when it is desired to make a note payable in paper money. These latter terms, in currency, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars.

"This being the meaning of the terms in specie, the case is brought directly within the decision of Bronson v. Rhodes, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States, declared to be a legal tender in payment of debts."

To same effect, see Luck v. Faulkner, 25 Cal. 404; Higgins v. B. R. & Aw. & M. Co. 27 Cal. 158; Smith v. Wood, 37 Tex. 620; Phillips v. Dugan, 21 Ohio N. S. 466; McGoon v. Shirk, 54 Ill. 408 (overruling Humphrey v. Clement, 44 Ill. 299; and Whetstone v. Colley, 36 Ill. 328); but see Wood v. Bullens, 6 Allen, 518; Killough v. Alford, 32 Tex. 457.

[1] McGoon v. Shirk, 54 Ill. 408.

[2] Killough v. Alford, 32 Tex. 457.

[3] Hepburn v. Griswold, 8 Wall. 604 (1869), Chase, C. J.

[4] The Legal Tender Cases, noted in 11 Wall. 682 (Knox v. Lee and Parker v. Davis), and reported in full in 12 Wall. 457 (1870); reaffirmed in Dooley v. Smith, 13 Wall. 605 (1871); Bigler v. Waller, 14 Wall. 298 (1871); Railroad Co. v. Johnson, 15 Wall. 195 (1872).

circumstances which divested it of that sanction and acquiescence which have usually attended the decisions of that high tribunal. And it may be well said of it (in the language used by Lord Brougham on an occasion which excited his indignation) that it was a "decision which went forth without authority, and will go back without respect." [1]

§ 1249. If the debtor tenders a depreciated currency in full satisfaction of his debt, or any other currency than gold when it is specifically payable in gold, the creditor cannot by protest accept the medium tendered, and then recover the amount that gold exceeded it in value. He must refuse the tender or accept it; and if he accepts it without special agreement, he will be considered to have taken it as offered in full satisfaction.[2] And the same rule applies in all cases where bank bills are tendered in discharge of debts payable in money.[3] In like manner, though the instrument be payable in bank notes, legal tender notes, or other medium less valuable than coin, yet, if the creditor tender gold or silver coin, without there being any contract as to the rate at which it is to be taken, and it be received, he cannot require it afterward to be applied otherwise than a dollar of coin for each dollar of the amount due, nor make any counter-claim for the value of the coin in excess of the value of the medium of payment expressed in the contract.[4]

SECTION VII.

APPROPRIATION OF PAYMENT.

§ 1250. When a debtor is indebted to the same creditor in several items of account, and pays him a sum of money in part liquidation of his entire indebtedness, it often becomes a nice and important question, not only between debtor and creditor, but also as to third parties, to what item the credit

[1] When judgment was reversed in the case of O'Connell v. McQueen.

[2] Gilman v. County of Douglas, 6 Nev. 27.

[3] See Chapter L, on Bank Notes.

[4] Bush v. Baldrey, 11 Allen, 367.

shall be applied. With certain limitations and exceptions, the following general principles apply in such cases:

(1) *First: The debtor making payment may appropriate it to whatever item he pleases when the payment is not under compulsion of law.*[1]—And this right on the part of the creditor continues as between him and his debtor until suit is brought or a dispute arisen; though in respect of third parties who are concerned by the time of application, he must not delay an unreasonable time.[2] And after he has once made it he is bound by it, and cannot change it.[3] He may even apply it in prejudice of the rights of a party who is security for one of the debts.[4]

There can be no election as to application of payment when there was but one debt in existence at the time of payment,[5] nor can there be any election after the controversy as to the application has begun.[6]

§ 1251. (2) *Second: If the debtor do not make application of payment, the creditor may apply it as he pleases.*[7] —In such case the silence of the debtor is construed as leaving the matter to the payee, provided it is not an application peculiarly injurious to him, or against his implied intention.[8] The creditor could not apply it to debts not due,

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[1] Chitty (13th Am. ed.) [*402], 453; Edwards, 554; 2 Parsons N. & B. 222; Taylor v. Sandford, 7 Wheat. 13; U. S. v. January, 7 Cranch, 572; Pindall v. Bank of Marietta, 10 Leigh, 484, Cabell, J.; Miller v. Trevillian, 2 Rob. 1; Simson v. Ingham, 2 B. & C. 72; Hooper v. Keay, 1 Q. B. Div. 178 (1875); Chapmam v. Com. 25 Grat. 721; Whittaker v. Groover, 50 Ga. 174; Sprinkile v. Martin, 72 N. C. 92; Clarke v. Scott, 45 Cal. 86.

[2] Mayor of Alexandria v. Patten, 4 Cranch, 317; U. S. v. Kirkpatrick, 9 Wheat. 720; Pattison v. Hull, 9 Cow. 747; Johnson v. Johnson, 30 Ga. 857; Philpott v. Jones, 2 A. & E. 41; Chitty on Bills (13th Am. ed.) [*404], 456.

[3] Mayor, &c. v. Patten, *supra;* Hill v. Southerland, 1 Wash. (Va.) 128. Even though he has applied it to an illegal claim. Hubbell v. Flint, 15 Gray, 550.

[4] Goddard v. Cox, 2 Stra. 1194; Kirby v. Duke of Marlborough, 2 Maule & S. 18; Chitty [*402], 454.

[5] Donally v. Wilson, 5 Leigh, 329. [6] U. S. v. Kirkpatrick, 9 Wheat. 720.

[7] Pattison v. Hull, 9 Cow. 747; Chapman v. Com. 25 Grat. 721; Bennell v. Wilder, 67 Ill. 327; Allen v. Culver, 3 Den. 284; Bean v. Brown, 54 N. H. 395; Woods v. Sherman, 71 Penn. St. 100.

[8] Smith v. Screven, 1 McC. 368. "If he (the debtor) does not make a specific

if there were debts already due.[1] The privilege does not apply to compulsory payments;[2] and if appropriation is once made by the creditor, he cannot change it.[3] If the debtor deny one of the debts, the creditor cannot apply payment to it in exclusion of one acknowledged.[4] And though the creditor refuse, yet if he receive the money, he must apply it as directed.[5]

§ 1252. (3) *Third: When neither party appropriates the payment, the law will apply it according to equitable principles, and with regard to the probable intention of the parties.*[6]—It will impute the payment to interest before principal;[7] and where the interest itself bears interest, it will impute it, first, to interest on interest, secondly, to interest on principal, and thirdly, to the principal.[8] It will also impute payment to those debts which are prior in date;[9] and to unsecured in preference to secured debts,[10] unless the latter are secured by a surety, in which case the appropriation will be made for his relief.[11]

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application at the time of payment, then the right of application generally devolves on the party who receives the money." Hooper v. Keay, 1 Q. B. Div. 178, Blackburn, J.

[1] Bobe v. Stickney, 36 Ala. 482.

[2] Blackstone Bank v. Hill, 10 Pick. 129.

[3] Tooke v. Bonds, 29 Tex. 419; Hill v. Southerland, 1 Wash. (Va.) 128; Mayor of Alexandria v. Patten, 4 Cranch, 317; White v. Trumbull, 3 Green (N. J.), 314; Bank of N. A. v. Meredith, 2 Wash. C. C. 47. If the debtor were not notified, it is otherwise. Hankey v. Hunter, Peake Ad. Cas. 107.

[4] Tayloe v. Sandiford, 7 Wheat. 13.

[5] Reed v. Boardman, 20 Pick. 441; Wetherell v. Joy, 20 Me. 325.

[6] See Chitty on Bills [*403, 404], 455, 456.

[7] Lash v. Edgerton, 13 Minn. 210. If payment is made before maturity of a debt drawing interest, it will be appropriated to principal instead of interest. Starr v. Richmond, 30 Ill. 276.

[8] Anketel v. Converse, 17 Ohio St. 11.

[9] Mills v. Fowlkes, 5 Bing. N. C. 461; U. S. v. Kirkpatrick, 9 Wheat. 720; Bobe v. Stickney, 36 Ala. 482; Smith v. Loyd, 11 Leigh, 512; Wendt v. Ross, 33 Cal. 650; Horne v. Planters' Bank, 32 Ga. 1.

[10] Lash v. Edgerton, 13 Minn. 210; Moss v. Adams, 4 Ired. Eq. 42; Baine v. Williams, 10 Sm. & M. 113; Burch v. Tebbutt, 2 Stark. 74; but see Gwinn v. Whitaker, 1 H. & J. 754.

[11] Marryatts v. White, 2 Stark. 101.

So it will apply payment to the debt most burdensome to the debtor, especially to one bearing interest, or subjecting him to a penalty or criminal charge, rather than to those which are less burdensome.[1] So to a debt which is still binding in law rather than to one barred by the statute of limitations.[2] It has been thought, however, that a creditor may apply payment to a debt barred by limitation when the debtor makes no election.[3] But this is doubtful at least. The debtor only would be permitted to apply it to an illegal demand.[4] If one of two demands becomes barred by limitation before any appropriation of payment is made, then the law will appropriate payment to the barred debt.[5]

If payment is made to a party who holds a debt due to himself, and another due to himself and the plaintiff, he is bound to apply the payment ratably between the two debts.[6]

§ 1253. If a partner owes a debtor, of whom his firm is debtor also, and pays the money of the firm, it will be appropriated by law to the debt of the firm;[7] and if he pays such debtor his own money, it will be appropriated to his own debt.[8] And no appropriation will be allowed which has the effect of paying one man's debt with another man's money.[9] When a person owes the same debtor on joint and on individual account, and simply pays an amount, without appropriating it specifically, or it appearing whether it came from his individual or his joint funds, the creditor may apply it to either account.[10] "Where one of several partners

[1] Wright v. Laing, 3 B. & C. 165; Meggot v. Mills, 1 Lord Raym. 286; Peters v. Anderson, 5 Taunt. 596; Spiller v. Creditors, 16 La. Ann. 292; *contra*, Mills v. Fowlkes, 5 Bing. N. C. 455; 7 Scott, 444; Stone v. Seymour, 15 Wend. 29.

[2] Nash v. Hodgson, 6 De G. M. & G. 474.

[3] Armistead v. Brooke, 18 Ark. 521; Mills v. Fowlkes, 5 Bing. N. C. 455.

[4] Kidder v. Norris, 18 N. H. 532; Rohan v. Hanson, 11 Cush. 44; Stone v. Talbot, 4 Wis. 442.

[5] Robinson's Admrs. v. Allison, 36 Ala. 525.

[6] Colby v. Copp, 35 N. H. 434.

[7] Thompson v. Brown, Moody & M. 40.

[8] Fairchild v. Holly, 10 Conn. 175.

[9] Thompson v. Brown, Moody & M. 40.

[10] Van Rensselaer's Ex'rs v. Roberts, 5 Den. 570; Baker v. Stackpole, 9 Cow. 420.

dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt."[1]

SECTION VIII.

PAYMENT SUPRA PROTEST OR FOR HONOR.

§ 1254. There is a peculiar kind of payment sometimes made after protest, and which is called accordingly payment *supra protest*. It is a general principle of the common law, that a stranger cannot voluntarily, and without the request of another, pay his debt and acquire a right to reimbursement.[2] But an exception is made in respect to bills of exchange, and for the benefit of trade, which is not extended even to negotiable notes.[3] When the bill has been protested for non-payment, and not before,[4] a stranger may pay it for the honor of the drawer, or acceptor (if it has been accepted), or of any indorser, or he may pay it for the honor of all the parties—for honor generally, as such a payment is termed. And such a payment does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying limits and narrows them.[5] If the payment is made for the honor of a particular indorser, the party paying may sue such indorser, and all parties prior to him whom he could have resorted to, but not subsequent indorsers, for it stands like a payment made at the request of the indorser, for whose honor it is made, and the payor *supra pro-*

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[1] Simon v. Ingham, 4 Q. B. & C. 72, Bayley, J.; Hooper v. Keay, 2 Q. B. Div. 178.

[2] Story on Notes, § 453.

[3] Smith v. Sawyer, 55 Me. 141.

[4] Vandewall v. Tyrrell, 1 Mood. & M. 87; Bayley (2d Am. ed.), 328; Chitty [*508, 509], 575; Byles [*262], 409.

[5] Chitty on Bills (13th Am. ed.) [*509], 576.

test narrows and limits his rights to recover against them only.[1] But if he pays for honor of the bill generally, it is the same as payment for the honor of the last indorsee, and he may recover against all parties to the bill,[2] declaring specially upon the bill, according to the custom of merchants,[3] or generally upon a count for money paid for defendant's use.[4] But Mr. Chitty says "it is considered safer to declare specially."[5]

§ 1255. As the party paying *supra protest* becomes substituted, as against parties anterior to the one for whose honor he pays, to the rights and remedies which such party for whose honor he pays would have had against them, had he himself paid, it follows that the right of one who pays for the honor of the drawer to sue the acceptor depends upon whether or not the acceptance was for value.[6] In England, it was at first held that he could sue the acceptor, whether he had effects of the drawer in his hands or not;[7] but this view was subsequently overruled, and the doctrine of the text established.[8]

§ 1256. The acceptor, if he have previously made a simple acceptance, cannot pay for honor of an indorser, because, as acceptor, he is already bound in that character.[9] But if he has accepted the bill for the drawer's acommoda-

[1] Mertens v. Withington, 1 Esp. 112; Chitty [*509], 577.

[2] Fairley v. Roch, Lutw. 891; Chitty [*509], 576, 577; Byles (Sharswood's ed.) [*261], 408; Edwards, 441.

[3] Cox v. Earle, 3 B. & Ald. 430; Fairley v. Roch, Lutw. 891.

[4] Vanderwall v. Tyrrell, Mood. & M. 87; Smith v. Nissen, 1 T. R. 269, semble.

[5] Chitty [*510], citing Reid v. Smart.

[6] Byles (Sharswood's ed.) [*260], 407, 408; Chitty [*508], 575.

[7] *Ex parte* Wackerbath, 5 Ves. 574 (1800), the Lord Chancellor saying: "I have talked to one or two persons in trade upon this, who answered that the persons accepting for the honor of the drawer have a right to come upon the acceptor. I put the case, that the drawer had no effects in the hands of the acceptor. The answer is, they accept for the honor of the drawer, but they accept an accepted bill. The justice of the case is, that if there were no effects they should go in the first place against the drawer, but they should not be altogether without remedy."

[8] *Ex parte* Lambert, 13 Ves. Jr. 179 (1806).

[9] Chitty on Bills (13th Am. ed.) [*508], 575.

tion, without being in possession of effects, and no provision is made by the drawer for its payment, he may pay it *supra protest*, and acquire a remedy against the drawer on the bill.[1] But this is unnecessary, except as a precaution in regard to evidence, for without it the acceptor might, in an action for money paid, recover back the amount, though he could not without such ceremony recover on the bill.

§ 1257. The person who desires to pay a bill for the honor of another, must be ready and offer to do so at the time and place of payment, otherwise he will have no right to insist on that privilege.[2]

No person should make a payment *supra protest* without ascertaining that the signatures of those for whose honor he pays are genuine, for should it turn out otherwise, he would have no remedy against them. Nor could he recover back the amount from the party to whom he has paid it, unless he discovers the mistake, and gives notice to him in time to prevent any loss.[3] And it has been held that the forgery must be discovered, and the notice thereof given, on the very day of payment, so as to enable the party who holds the bill to give the promptest notice of dishonor, and secure the liability of all prior parties.[4]

§ 1258. *The formal mode of making payment supra protest is this:* The party proposing to make such payment goes before a notary public after the bill has been noted for protest[5] (though it is not necessary that the protest should have been formally extended),[6] and makes a declaration for whose honor he makes payment, which declaration should be recorded by the notary, either in the protest or in a

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[1] Ibid.

[2] Denston v. Henderson, 13 Johns. 322; Bayley on Bills (2d Am. ed.) 329.

[3] See Chapter XLII, on Forgery, Section IV.

[4] Wilkinson v. Johnson, 3 B. & C. 428; 5 Dow. & Ry. 403. See Chapter XVIII, on Acceptance, § 528, note, vol. 1; Chitty on Bills [*509], 575.

[5] Vandewall v. Tyrrell, 1 Moo. & M. 87. See Chapter XVIII, Section VI, § 522, vol. 1.

[6] Geralopulo v. Wieler, 10 C. B. 690 (70 E. C. L. R.)

separate instrument.[1] He must then, in a reasonable time, notify the party for whose honor he pays, otherwise such party will not be bound to refund.[2]

It is observed by Byles, that "the most obvious and advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonored bill is simply to pay the amount to the holder, and take the bill as an ordinary transferee. But the holder may possibly object; for example, the bill may not have been indorsed in blank, and the holder may refuse to indorse even *sans recours*. In such an event a payment *supra protest* becomes essential."[3]

The privilege of payment *supra protest* is not extended by the law merchant to promissory notes which are not designed for such general circulation as bills of exchange, and the party making such payment acts at his peril.[4]

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[1] Byles (Sharswood's ed.) [*260], 407; Chitty [*509], 575, 576; Edwards on Bills, 441.

[2] Wood v. Pugh, 7 Ham. 164.

[3] Byles (Sharswood's ed.) [*261], 408.

[4] Byles on Bills (Sharswood's ed.) [*262]; Story on Notes, § 453.

CHAPTER XXXIX.

CONDITIONAL AND ABSOLUTE PAYMENT.—TAKING BILL OR NOTE FOR OR ON ACCOUNT OF A DEBT.

SECTION I.

WHEN THE PRESUMPTION OF PAYMENT ARISES FROM TAKING A BILL OR NOTE.

§ 1259. When a bill or note is taken for or on account of a debt, the question arises whether it was taken in absolute discharge of it, and operates as a complete merger, or simply as a collateral security, or in suspension of the debt during its currency. The intention of the parties is the controlling element. And if there be any distinct agreement on the subject all controversy is silenced. But when no particular intention is manifested, and no express or implied agreement appears, the question is to be solved by principles of law which makes presumptions as to the intention of the parties according to the circumstances of each particular case. Sometimes the debt is antecedent to the giving of the bill or note; sometimes cotemporaneous. And the debtor may give (1) his own bill or note; or (2) transfer the bill or note of another without indorsement; or (3) transfer it with indorsement.

§ 1260. *Debtor's note for precedent debt.—Firstly*, let us consider the case when the debtor gives his own bill or note for or on account of a precedent debt. It is a general principle of law that one simple executory contract does not extinguish another for which it is substituted, and negotiable securities form no exception. And by the general commer-

cial law, as well of England [1] as of the United States,[2] a bill of exchange drawn or promissory note made by the debtor does not discharge the precedent debt for which it is given, unless such be the agreement of the parties. The creditor may return the bill or note when dishonored by non-acceptance or non-payment, and proceed upon the original debt. The acceptance of the instrument by the creditor is considered as accompanied by the condition of its payment. Thus, it was said in the time of Lord Holt: "A bill shall never go in discharge of a precedent debt, except it be a part of the contract that it shall be so.[3] Such has been the rule in England ever since; and it proceeds upon the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is agreed to be received in its place; and that a mere promise to pay ought not to be regarded as an effective payment is manifest.

It is to be regretted that any exception should be found in the adjudicated cases to the adoption of a principle so generally prevalent and so well founded in reason. But the courts

[1] Dowse v. Master, Style, 263; Smith v. Chester, 1 T. R. 655; Richardson v. Rickman, 5 T. R. 517; Price v. Price, 16 M. & W. 232.

[2] The Kimball, 3 Wall. 45; Bank U. S. v. Daniel, 12 Pet. 32; Peters v. Beverly, 10 Pet. 532; Downey v. Hicks, 14 How. 240; Clark v. Young, 1 Cranch, 181; Sheehy v. Mandeville, 6 Id. 253; Lewis v. Davison, 29 Grat. 226; McCluny v. Jackson, 6 Grat. 96; McGuire v. Gadsby, 3 Call, 324; Armistead v. Ward, 2 Pat. & H. 515; Middlesex v. Thomas, 5 C. E. Green, 39; Glenn v. Smith, 2 Gill & J. 512; Clopper v. Union Bank, 7 Har. & J. 120; Walton v. Bemiss, 16 La. 140; McLaren v. Hall, 26 Iowa, 298; Steamboat Charlotte v. Hammond, 9 Mo. 63; Yarnell v. Anderson, 14 Id. 619; Doebling v. Loss, 40 Id. 150; Archibald v. Argall, 53 Ill. 307; Miller v. Lumsden, 16 Ill. 161; Logan v. Attix, 7 Iowa, 77; Davis' Estate, 5 Whart. 537; Jones v. Strawhan, 4 Watts & S. 261; McIntyre v. Kennedy, 29 Penn. St. 448; Dougal v. Cowles, 5 Day, 511; Merrick v. Boury, 4 Ohio St. 60; Sutliff v. Atwood, 15 Ohio St. 186; Burdick v. Green, 15 Johns. 249; Cole v. Sackett, 1 Hill, 516; Winsted Bank v. Webb, 39 N. Y. 325; Hawley v. Foote, 19 Wend. 516; Frisbie v. Larned, 21 Wend. 450; Syracuse R. R. Co. v. Collins, 3 Lans. 29; Smith v. Miller, 43 N. Y. 171; Gordon v. Price, 10 Ired. 385; McNeil v. McCamley, 6 Tex. 163; Union Bank v. Smiser, 1 Sneed, 501; Marshall v. Marshall, 42 Ala. 149; Myatts v. Bell, 41 Ala. 222; Guion v. Doherty, 43 Miss. 538; Stam v. Kerr, 31 Miss. 199; Welch v. Allington, 23 Cal. 322; Smith v. Owens, 21 Cal. 11; Edwards on Bills 203; Breitung v. Lindauer, 37 Mich. 217; Poole v. Rice, 9 W. Va. 73; Crawford v. Roberts, 50 Cal. 236; Brown v. Olmsted, 50 N. Y. 163.

[3] Clark v. Mundal, 1 Salk. 124.

of Massachusetts, Maine, Vermont and Louisiana, have held that the taking of a bill or note on account of a precedent debt is to be presumed to be a satisfaction of it; but they admit parol evidence to rebut this presumption, by proof of an express or implied contract that the debt should only be suspended, not discharged.[1]

§ 1261. *Secondly: Debtor's note for cotemporaneous debt.* —When a person contracts a debt or purchases goods, and cotemporaneously executes his own note for the amount, Story[2] considers it *prima facie* conditional payment only; while Parsons says:[3] "It seems to be substantially selling a note by barter, or exchanging it for goods." "And we can hardly conceive," he adds, "of a bill being taken at the time of the sale, unless it be the understanding of the parties to regard it as payment. The remedy on the note or bill, which is more convenient to the creditor, is all that should be allowed him, for there is no sufficient reason for allowing resort to be had to the original."

There is certainly great force in the reasoning of Parsons. But, on the other hand, the debtor has broken his contract to pay when his bill or note is dishonored; and if the creditor, who has parted with value, sues for the original consideration, the authorities predominate in favor of allowing him to recover;[4] though the views of Parsons are sustained by

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[1] Ely v. James, 123 Mass. 36, and held presumably the same in Maine. Appleton v. Parker, 15 Gray, 173; Thatcher v. Dinsmore, 5 Mass. 302; Whitcomb v. Williams, 4 Pick. 231; Chapman v. Durant, 10 Mass. 51; Goodenow v. Tyler, 7 Mass. 38; Wood v. Bodwell, 12 Mass. 289; Varner v. Nobleborough, 2 Greenl. 124; Gooding v. Morgan, 37 Me. 619; Gilmore v. Bussey, 12 Me. 418; Ward v. Bourne, 56 Me. 161; Hutchins v. Olcutt, 4 Vt. 549; Torrey v. Baxter, 13 Vt. 452; Dickinson v. King, 28 Vt. 378; Farr v. Stevens, 26 Vt. 299; Gaskins v. Wells, 15 Ind. 253, since overruled; Hunt v. Boyd, 2 La. 109; Mehlberg v. Fisher, 24 Wisc. 607. The learned editors of American Leading Cases attribute the departure of these cases from the general rule to a variation in the course of business, which attaches a different meaning to the same acts and declarations. 2d vol. 250.

[2] Story on Notes, § 104. [3] 2 Parsons N. & B. 157.

[4] In 2 American Lead. Cases, 263, it is said: "There is much less reason for supposing that payment for a contemporaneous sale on the bills or notes of an individual is absolute, than where it is made in bank notes; and it would seem

some of the adjudicated cases. And were the question of new impression, we should be inclined to adopt them.

§ 1262. *Thirdly: Stranger's bill or note for precedent debt indorsed or unindorsed.*—If A. be indebted to B. in the sum of one hundred dollars, and when applied to for the money, he gives him the draft of C. on D., payable to his (A.'s) order, and himself indorses it, he would, of course, be liable as indorser in the event of its dishonor, and of due presentment and notice. But suppose he simply passes to B., by delivery, the draft of C. on D. payable to bearer, and that, when due, it is dishonored, does the precedent indebtedness revive? In England, where goldsmiths' and bankers' notes are so passed by delivery for precedent debts, it is considered that, if not paid after due diligence taken in presenting them, the creditor may sue on the original consideration, provided he gives timely notice of their dishonor;[1] and it has been considered that the same rule governs the transfer by delivery of ordinary bills and promissory notes of private persons.[2] High American authorities support this view,[3] and it is earnestly advocated as the wisest and best view; but there is great force in the reply that, as such instruments may be indorsed, and generally are indorsed, when the transferrer assumes any liability for their payment, the more natural presumption, however easily overthrown, would be that

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that this effect cannot be ascribed to it, as a matter of law, and apart from the agreement of the parties. The cases fully establish that, in the absence of such an agreement, the vendor may sue for goods sold and delivered, when the instrument is drawn and indorsed by the vendee, and is dishonored by the party primarily liable for its payment, as maker or acceptor." See Sheehy v. Mandeville, 6 Cranch, 253.

[1] Ward v. Evans, 2 Ld. Raym. 928; Moore v. Warren, 1 Stra. 415.

[2] Camidge v. Allenby, 6 B. & C. 373; Swinyard v. Boyes, 5 M. & S. 62; Van Wart v. Woolley, 3 B. & C. 439; s. c. 5 Dow. & R. 374; *Ex parte* Blackburne, 10 Vesey, 204; Story on Bills, § 225.

[3] M'Lughan v. Bovard, 4 Watts, 315, Gibson, C. J.; Gordon v. Price, 10 Ired. Law R. 388, Ruffin, C. J.; Downey v. Hicks, 14 How. 249 (a certificate of deposit), Taney, C. J.; Gibson v. Tobey, 53 Barb. 195; Crane v. McDonald, 45 Barb. 355; Noel v. Murray, 3 Kern. 169; 1 Duer, 388; Gallagher v. Roberts, 2 Wash. C. C. 193.

when the transferee takes them without indorsement, he takes the risk on himself.[1] If the party indorses the note, it will operate as absolute payment, unless he has due notice of dishonor.[2] A refusal of the debtor to indorse that, would be evidence that it was received as payment.[3]

§ 1263. In an English case, where it appeared that in the morning A. sold B. a quantity of corn, and at three o'clock in the afternoon of the same day, B. delivered to A., in payment, certain promissory notes of the Bank of C., which had then stopped payment, but which circumstance was not at the time known to either party, Bayley, J., said: "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but if he consented to receive the notes as money, they would have been taken by him at his peril." And it was held that B. was bound, as the notes were given after the debt was contracted.[4] But this distinction has been much criticised.[5]

§ 1264. *Fourthly: Stranger's note for cotemporaneous debt unindorsed.*—When the debtor transfers the bill or note of a third party for a cotemporaneous debt, without indorsing it, there is certainly strong reason for presuming the transaction to be an exchange of the bill or note for the consideration moving to the debtor. The debtor parts with his property in the instrument, and the party with whom he is dealing parts with his goods, undertakes to do something, or otherwise gives him value. The instrument transferred, in the absence of an express or implied agreement, would seem to constitute in itself the consideration moving from

[1] Dennis v. Williams, 40 Ala. 633. Payee surrendered a note, and took note of stranger from debtor, without indorsement. *Held*, absolute payment.

[2] Solfe v. Gallagher, 3 E. D. Smith, 507; Stam v. Kerr, 31 Miss. 199; *contra*, Cook v. Beech, 10 Humph. 413.

[3] Breed v. Cook, 15 Johns. 241.

[4] Camidge v. Allenby, 6 B. & C. 373. See Chapter XXII, § 740, vol. 1, and also Chapter on Bank Notes; 2 Parsons N. & B. 156, note m.

[5] Timmins v. Gibbins, 18 Q. B. 722; 14 E. L. & Eq. 64; Corbet v. Bank of Smyrna, 2 Harring. (Del.) 235.

the vendee, and there would be no debt merged in it, or capable of revivor by its dishonor. This view is well sustained by authority,[1] but not without dissent.

§ 1265. *Fifthly: Stranger's note for cotemporaneous debt indorsed.*—When the debtor transfers and indorses the bill or note of a third party for a cotemporaneous debt, the view is generally adopted that there is a presumption of conditional payment only. The indorsement is like the drawing of a new bill by the debtor, and, as his contract is broken by its dishonor, the creditor may sue, as in the first case, for the amount of the consideration. The indorsement by the debtor, by which he incurs personal liability, rebuts the presumption of a mere exchange of the paper for the goods or other consideration, which arises when there is mere transfer of a third party's bill or note, by delivery, or indorsement without recourse.[2]

§ 1266. *Presumptions as to, and effect of, renewals.*—Where a new bill or note is given in renewal of another bill or note, and the original is retained, the new bill or note operates only as a suspension of the debt evidenced by the original, and is not a satisfaction of it until paid. Such at least is the weight of authority.[3] And in England it has

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[1] Bank of England v. Newman, 1 Ld. Raym. 442 (1699); Chitty, Jr. 207, Holt, C. J., saying: "If a man give such a bill (a bill payable to himself or bearer) for money not due before without indorsement, it is a sale of the bill." *Ex parte* Blackburne, 10 Ves. 204; Fydell v. Clark, 1 Esp. 447. A banker discounting a bill gave his customer bills and notes without indorsing them. Lord Kenyon said (the bills turning out bad): "Having taken them without indorsing them, he hath taken the risk on himself." Whitbeck v. Vanness, 11 Johns. 409; Breed v. Cook, 15 Johns. 242; Tobey v. Barber, 5 Johns. 68; Noel v. Murray, 1 Duer, 388, Oakley, C. J.; Camidge v. Allenby, 6 B. & C. 373; 2 Parsons N. & B. 156, 183; Byles (Sharswood's ed.) [*154, 372, 373], 275, 552; Edwards, 204; Gibson v. Toby, 53 Barb. 195 (1869). But presumption may be rebutted. Porter v. Talcott, 1 Cow. 381; Rew v. Barber, 3 Cow. 279; Torrey v. Hadley, 27 Barb. 196; Gordon v. Price, 10 Ired. Law R. 388, Ruffin, C. J.

[2] Monroe v. Huff, 5 Den. 369; Boyd v. Hitchcock, 20 Johns. 76; Soffe v. Gallagher, 3 E. D. Smith, 507; Shriner v. Keller, 25 Penn. St. 61; 2 Am. Lead. Cas. 263; 2 Parsons N. & B. 159.

[3] Kendrick v. Lomax, 2 C. & J. 405; Bishop v. Rowe, 3 M. & S. 362; Cumber v. Wane, 1 Stra. 426. In McGuire v. Gadsby, 3 Call, 234, eleven small notes for

been held that if the new bill or note, though paid at maturity, be not large enough to cover the principal and interest of the dishonored bill, the latter revives and may be sued on.[1] But there are cases in which it is held that the old note is merged in the new one.[2] Where a note is renewed, it is said by eminent authority that, according to the general custom and understanding of the mercantile world, the new note cancels the old note for which it is given, and which is taken up as it is termed;[3] but no precedent clearly in point is cited, and the distinction is not recognized in the adjudicated cases.[4]

In a number of cases it is held to depend upon the intention of the parties,[5] and, of course, an express agreement would control the effect of giving the new note. But it

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fifty dollars each were given to the plaintiff McGuire by Gadsby, who owed him five hundred and fifty dollars on his original note for that amount. Three of the small notes were paid, and eight remaining unpaid, McGuire brought suit on the note for $550, and the defendant pleaded payment and gave these facts in evidence. Roane, J.: "Do the smaller notes extinguish the former? On this subject we take the law to be settled, that, in order to make one instrument an extinguishment of another, the latter must be of a higher dignity than the former, or must put the plaintiff in a better condition, neither of which is the case of these notes, all precisely of the same tenor, and not sealed; nor do the latter place the plaintiff in a better condition than the former. They benefit the defendant, indeed, by giving him a further day of payment, which he did not avail himself of, and cannot now turn that favor to the prejudice of the plaintiff who did not sue until three months after the most remote payment was to have been made." East River Bank v. Butterworth, 45 Barb. 476; Moses v. Price, 21 Gratt. 556; Hobson v. Davidson, 8 Mart. (La.) 431. In *ex parte* Barclay, 7 Ves. 597, the new bills were given "in lieu" of the originals, but the latter being left with the plaintiff, it was held he could sue upon them. Byles (Sharswood's ed.) [*229], 373.

[1] Lumley v. Musgrave, 4 Bing. N. C. 9; 5 Scott, 230.

[2] Nichol v. Bate, 10 Yerg. 429; Hill v. Bostick, 10 Humph. 410; Slaymaker v. Gundacker, 10 S. & R. 75, *per* Tilghman, C. J. In Maine, Massachusetts and Vermont, where a note is presumed to be payment, the new note is of course presumed to discharge the old. Cornwall v. Gould, 4 Pick. 444; Huse v. Alexander, 2 Metc. 157.

[3] 2 Parsons N. & B. 203; Bank of Commonwealth v. Letcher, 3 J. J. Marsh. 195, *obiter*.

[4] Moses v. Trice, 21 Gratt. 556; Olcutt v. Rathbone, 5 Wend. 490. See vol. 1, § 205.

[5] Weakly v. Bell, 9 Watts, 273.

should be shown that it was expressly agreed that the old one should be extinguished, in order to have the effect of extinguishment;[1] and delivery of the old note without such agreement does not of itself operate as a presumption of extinguishment;[2] not even when new note has been sued on and judgment obtained.[3]

Even where a note is considered as paid and discharged by one given for it, as a general rule the case is excepted where the debt would by such construction be lost, because then the intention to receive the second as a discharge would be *prima facie* rebutted. This view was taken where the first note was secured by mortgage.[4]

§ 1267. The presumptions of law which have been referred to are universally held to be open to rebuttal; and it is competent for the parties to show that the bill or note was by express agreement received in absolute payment and discharge of the cotemporaneous or precedent debt, or the contrary,[5] or that there were facts and circumstances attendant

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[1] Crockett v. Trotter, 1 Stew. & P. 446.

[2] Olcutt v. Rathbone, 5 Wend. 490; Welch v. Allington, 23 Cal. 322; Edwards on Bills, 200; *contra*, Morgan v. Creditors, 1 La. 527; Smith v. Harper, 5 Cal. 329. See *ante*, vol. 1, § 205.

[3] In First Nat. Bank v. Morgan, 13 N. Y. S. C. (6 Hun), 348, suit was brought on a note dated September 8th, 1869. On November 8th, 1869, a renewal note was given in place of the preceding, which had been delivered up; and upon the renewal note judgment was obtained, but execution thereon was returned unsatisfied. Bockes, J., said: "Now did the acceptance of this note of November 8th, and the subsequent proceedings thereon to enforce its payment, discharge the debt as against Morgan's estate? The giving of the note of November 8th did not satisfy or discharge the debt evidenced by the note of September 8th. Cole v. Sackett, 1 Hill, 516; Elwood v. Deidendorf, 5 Barb. 398; Winsted Bank v. Webb, 39 N. Y. 325; Pratt v. Foote, 12 Barb. 212, 213; Farrington v. Frankfort Bank, 24 Id. 562; Olcott v. Rathbone, 5 Wend. 490; Bates v. Rosekrans, 37 N. Y. 409. Nor did its prosecution to judgment without satisfaction. Davis v. Anable, 2 Hill, 339; Hawks v. Hinchleff, 17 Barb. 492; Corn Exchange Ins. Co. v. Babcock, 57 Id. 231."

[4] Watkins v. Hill, 8 Pick. 522; see Pomeroy v. Rice, 16 Pick. 22; 2 Parsons N. & B. 219; see vol. 1, § 748.

[5] Boyd v. Hitchcock, 20 Johns. 76; Booth v. Smith, 3 Wend. 66; Thompson v. Wilson, 27 Ind. 370; Appleton v. Parker, 15 Gray, 173; Butts v. Dean, 2 Met. 76; Comstock v. Smith, 22 Me. 262; Follett v. Steele, 16 Vt. 30; Shumway v. Reid, 34 Me. 560.

upon the transaction from which an understanding and agreement might be inferred.[1] But the mere fact that a receipt or memorandum passed between the parties at the time speaks of the transaction as "in payment," or "payment in full," would not alone warrant the inference that absolute payment was intended, but would be interpreted as meaning conditional payment, to be in full when paid.[2] But a different view has been taken in some cases.[3] It is clear that when the receipt is "in full when paid," it contemplates the transaction as conditional payment only.[4]

And the presumption of payment does not apply where the creditor abandons some security which he held when he takes the paper.[5]

§ 1268. In some cases it has been held that an agreement to take a bill or note in absolute payment of a debt, must be express in order to render it such;[6] but the better opinion is that such agreement may be implied, as well as expressed, and that all the circumstances may be looked to to ascertain what was the actual agreement of the parties.[7]

§ 1269. If the debtor, at the time when he passes the bill or note of a third party in payment, represents that it is good, or that the parties to it are solvent, knowing at the time the contrary, it is a fraud upon the creditor, and immediately on discovering it he may sue the debtor for the orig-

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[1] Harris v. Lindsay, 4 Wash. C. C. 98, 271; White v. Howard, 1 Sandf. 81.

[2] Tobey v. Barber, 5 Johns. 68; Maillard v. Duke of Argyle, 6 Man. & G. 40; Berry v. Griffin, 10 Md. 27; Muldon v. Whitlock, 1 Cow. 290; Glenn v. Smith, 2 Gill & J. 494; Putnam v. Lewis, 8 Johns. 389; Steamboat Charlotte v. Hammond, 9 Mo. 58; 2 American Leading Cases, 246, 247.

[3] The rule in Louisiana is different. Barron v. How, 13 Mart. (La.) 144.

[4] Dayton v. Trull, 23 Wend. 345.

[5] Pomroy v. Rice, 16 Pick. 22; Butts v. Dean, 2 Metc. 76; Fowler v. Ludwig, 34 Me. 455.

[6] Dougal v. Cowles, 5 Day, 511; Muldon v. Whitlock, 1 Cow. 290; Hays v. Stone, 7 Hill, 128; Glenn v. Smith, 2 Gill & J. 493; Conkling v. King, 10 Barb. 372.

[7] Merrick v. Boury, 4 Ohio St. 60; Miller v. Lumsden, 16 Ill. 161; Fulford v. Johnson, 15 Ala. 384; Gordon v. Price, 10 Ired. 385; Hart v. Boller, 15 Serg. & R. 162; Berry v. Griffin, 10 Md. 27; Johnson v. Cleaves, 15 N. H. 332; Slocumb v. Holmes, 1 How. (Miss.) 139.

inal debt.[1] Or if such bill or note were given for goods delivered at the time, the vendor may disaffirm the contract, and sue in trover for the goods. In New York, where there was an agreement to sell a quantity of flour for the note of one Lyon, and when the flour was demanded and the note tendered Lyon had failed, it was held that the contract, though valid, was executory; and that the consideration for the flour had failed, and the vendor was not bound to part with the flour for the note of an insolvent.[2] The court assumed the law to be that upon an agreement to accept notes in payment, if the notes turned out bad before the article was delivered, a tender of them would not be good unless the vendor had contracted to run the risk.

§ 1270. In defense to an action on a debt, it is sufficient to plead that a bill or note payable to order or bearer was delivered for or on account of the amount, and is still current, or has been transferred to a third party.[3] It is necessary to state in the plea that the bill or note was payable to order or bearer.

If a debtor give a bill or note in payment to an agent whom he knows has no authority to receive anything but cash, he is not discharged from the demand of the principal.[4]

§ 1271. If the debtor, instead of paying the creditor, directs him to take a bill of a third person, and he does so, and the bill is dishonored, the debtor's liability revives;[5]

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[1] Bridge v. Batchelder, 9 Allen, 394; Hawse v. Crowe, 1 R. & M. 414; Pierce v. Drake, 15 Johns. 475; Bayard v. Shunk, 1 Watts & S. 94; Martin v. Pennock, 2 Barr, 376; Lowrey v. Murrell, 2 Port. 280; Brown v. Montgomery, 20 N. Y. 287; Long v. Sprull, 7 Jones (Law), 96; Delaware Bank v. Jarvis, 20 N. Y. 226; Gurney v. Womersley, 4 E. & B. 133 (82 E. C. L. R.); Fenn v. Harrison, 3 T. R. 759; Popley v. Ashlin, 6 Mod. 147; Holt, 121. See Chapter XXII, § 736, vol. 1; also 2 Pars. N. & B. 41, 266; Byles (Sharswood's ed.) [*157, 158], 278, 279, note; Story on Bills, § 225.

[2] Rogett v. Merritt, 2 Cai. 117.

[3] Kearslake v. Morgan, 5 T. R. 513; Griffiths v. Owens, 13 M. & W. 58; Price v. Price, 16 M. & W. 232; Crisp v. Griffiths, 2 C. M. & R. 159.

[4] Sykes v. Giles, 5 M. & W. 645.

[5] Marsh v. Pedder, 4 Camp. 257; Taylor v. Briggs, M. & M. 28; Byles on Bills (Sharswood's ed.) [*370], 550.

and it is not necessary that the creditor should notify him of the dishonor.[1] If the creditor, not having the option of taking cash, takes of his own accord a bill of the debtor's agent, the debtor is not discharged.[2] But if the debtor refers his creditor to a third person for payment generally, and the creditor, having the option of taking cash, elects to take a bill, which is afterwards dishonored, the original debtor is discharged.[3]

SECTION II.

SUSPENSION OF RIGHT OF ACTION BY TAKING BILL OR NOTE FOR OR ON ACCOUNT OF A DEBT.

§ 1272. There is no doubt that a negotiable bill or note given for or on account of a cotemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency—that is, until it is dishonored by non-acceptance or non-payment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might, in consequence of its negotiable character, transfer it to a *bona fide* holder, and subject the debtor to payment of both the original and the new debt.[4]

But as soon as the bill or note is dishonored, the original debt revives, and the creditor may pursue his remedy for it, or sue upon the bill or note.[5] The bill or note taken in conditional payment becomes, by its dishonor, a collateral security, which the creditor may retain and endeavor to col-

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[1] Swinyard v. Bowes, 5 M. & S. 62.

[2] Robinson v. Read, 9 B. & C. 444 (17 E. C. L. R.); Marsh v. Pedder, 4 Camp. 257; Byles on Bills (Sharswood's ed.) [*371], 550.

[3] Strong v. Hart, 6 B. & C. 160 (13 E. C. L. R.)

[4] Armistead v. Ward, 2 Pat. & H. 504; Black v. Zacharie, 3 How. 483; Van Epps v. Dillaye, 5 Barb. 244; Putnam v. Lewis, 8 Johns. 389; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Stedman v. Gooch, 1 Esp. 3; Kearslake v. Morgan, 5 T. R. 513; Griffith v. Owen, 13 M. & W. 58; Price v. Price, 16 Id. 231; Edwards, 197; Byles (Sharswood's ed.) [*229]. 373.

[5] Stedman v. Gooch, 1 Esp. 4; Owenson v. Morse, 7 T. R. 50; Tobey v. Barber, 5 Johns. 68.

lect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial.[1]

§ 1273. A bill or note given for or on account of a debt will not operate a suspension if the debtor fails to perform the entire agreement under which it was given. Thus, where suit has been commenced on a book account, and the defendant entered into an agreement to give his note for the amount and pay the costs of suit, but only gave his note, without paying such costs, it was held that the plaintiff might proceed in his action on the account.[2] And the like decision has been rendered even where the second bill had been negotiated.[3] But this has been justly said to be clearly wrong.[4] And clearly if the bill or note given for the antecedent debt were paid, the plaintiff could not then proceed upon it, although the costs were not paid as agreed.[5]

It is better in all cases where a bill or note is given or transferred for a cotemporaneous or precedent debt, that the parties should reduce their agreement respecting the transaction to writing, and state either that the instrument is taken in absolute payment, and at the creditor's risk, or else only in conditional payment to be in full when paid, which will at once settle controversy on the subject.[6] When this is not done, the question must necessarily be resolved by the jury, upon the statements of the parties and all the circumstances of the case,[7] except where there is no evidence whatever, in which event the presumptions which have been referred to would be followed.

§ 1274. The taking of a bill or note from a party bound by contract under seal, does not extinguish or suspend the

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[1] Price v. Price, 16 M. & W. 231.

[2] Putnam v. Lewis, 8 Johns. 389.

[3] Norris v. Aylette, 2 Camp. 329.

[4] Edwards on Bills, 299.

[5] Dillon v. Rimmer, 1 Bing. 100.

[6] Herring v. Sanger, 3 Johns. Cas. 71; Harris v. Lindsay, 4 Wash. C. C. R. 98, 271; 2 Am. Lead. Cas. 246.

[7] Hart v. Boller, 5 Serg. & R. 162; Johnson v. Weed, 9 Johns. 307; Lyman v. Bank U. S. 12 How. 244; Gardner v. Gorham, 1 Doug. (Mich.) 207.

remedy on the sealed instrument, until such bill or note is actually paid. Obtaining a judgment upon it does not alter the case.[1] Nor will the taking of a bill or note for arrears of rent prevent the landlord from pursuing his remedy of distress.[2] Taking a forged note does not discharge the original, although it be surrendered up;[3] nor is an indorser of the original discharged if he was fixed by due notice.[4] And taking a usurious security would stand upon the same footing as a forged one, the avoidance of the security because of the usury reviving the debt.[5]

SECTION III.

RIGHTS AND DUTIES OF HOLDER OF BILL OR NOTE TAKEN IN CONDITIONAL PAYMENT.

§ 1275. When suit is brought against a defendant upon a debt, whether evidenced by a note or otherwise, and it appears that he has given a bill or note for the same debt, which has become mature and is unpaid, while it does not operate as a bar to the suit, it is essential to the plaintiff's recovery that it be produced and surrendered up or otherwise satisfactorily accounted for at the trial. This is necessary as a safeguard to the defendant, for if the plaintiff should have passed it off before maturity to a third party, the defendant might be compelled to pay the debt a second time.[6] If the

[1] Drake v. Mitchell, 3 East, 251; Curtis v. Rush, 2 Ves. & B. 416; Byles (Sharswood's ed.) [*370], 549.

[2] Brown v. Gilman, 4 Wheat. 256; Chipman v. Martin, 13 Johns. 241; Harris v. Shipway, Buller N. P. 182; Byles [*370], 549; 2 Parsons N. & B. 164; Palfrey v. Baker, 3 Price, 572; Davis v. Gyde, 2 A. & E. 623; 4 N. & M. 462.

[3] Goodrich v. Tracy, 43 Vt. 319.

[4] Ritter v. Singmaster, 73 Penn. St. 400.

[5] Gerwig v. Sitterly, 56 N. Y. 214; Cook v. Barnes, 36 Id. 520; Hughes v. Wheeler, 8 Cow. 77; Goodrich v. Tracy, 43 Vt. 319.

[6] Matthews v. Dare, 20 Md. 248; Cole v. Sacket, 1 Hill, 516; Lobey v. Barber, 5 Johns. 66; Dayton v. Trull, 23 Wend. 345; Alcock v. Hopkins, 6 Cush. 484; Hays v. McClurg, 4 Watts, 452; Milles v. Lumsden, 16 Ill. 161; Harris v. Johnston, 3 Cranch, 311; Jones v. Savage, 6 Wend. 658; Raymond v. Merchant, 3

note were lost, and were negotiable, the better opinion is that the debtor should sue in equity where indemnity could be required, against its appearance in the hands of a *bona fide* holder.[1]

§ 1276. When a party contracts a debt, and cotemporaneously gives in conditional payment his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment, and to give notice in the event of its dishonor to the drawer. If he fail to make such presentment, or to give due notice, the drawer is not only discharged from liability on the bill, but also from the debt or consideration for or on account of which it was given.[2] And where a bill or note is indorsed by the creditor in conditional payment of a debt, the same rule would apply, the indorser standing in the relation of a new drawer; and if there were any laches respecting presentment or notice, he would be no longer liable on the note, or for the consideration.[3] The same rule applies where the debt was

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Cow. 150; Smith v. Lockwood, 10 Johns. 367; Lazier v. Nevin, 3 Hagans (W. Va.) 622; Edwards on Bills, 204.

[1] In Dangerfield v. Wilby, 4 Esp. 159, where the plaintiff sued to recover money lent, and it appeared that the debtor had given a note for the amount, which was not produced or accounted for, Lord Ellenborough non-suited him, saying: "It was incumbent on him to show it to be lost, so that the defendant should not be again subjected to payment of it."

[2] Berry v. Bridges, 3 Taunt. 130 (1810). The defendant being unable to pay a bill when it fell due, which he had accepted, indorsed to the plaintiff a bill drawn by the debtor himself and payable to his own order. It was dishonored by the drawee, who accepted but did not pay it, and no notice was given the defendant. *Held* that defendant was discharged both from the bill and the antecedent debt, for the reason that the plaintiff, by not giving him due notice, had put it out of his power to recover what was due thereon.

In Dayton v. Trull, 23 Wend, 345, the defendant gave his draft payable one year from date, and the plaintiff suing for the precedent debt, it was held that he must show that the draft had not been paid, and that due diligence had been exercised to present it, and give notice. Bronson, J.

Smith v. Miller, 43 N. Y. 171, where it is said: "Laches, which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt for payment of which a bill or other negotiable instrument is transferred;" s. c. 52 N. Y. 546. Mehlberg v. Fisher, 24 Wisc. 607; Middlesex v. Thomas, 5 C. E. Green, 39; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Story on Bills, § 109; Edwards on Bills, 445.

[3] Jennison v. Parker, 7 Mich. 355; Phœnix Ins. Co. v. Allen, 11 Mich. 501;

precedent.[1] And in like manner if the creditor takes a bill drawn and accepted, or indorsed by third parties, or a note indorsed by third parties as conditional payment or collateral security for a debt, and omits to present it at maturity, or give notice of its dishonor to those entitled thereto, it becomes money in his hands as between him and his debtor, and constitutes absolute payment.[2]

Where, however, a debtor gives his own note indorsed by other parties, or the bill or note of another party indorsed by himself, as collateral security merely for a debt already secured by his own note or otherwise, the creditor may pursue his remedy upon the principal and upon the collateral securities at the same time; and nothing but satisfaction of the one will bar his right of recovery on the other.[3]

§ 1277. But the authorities are somewhat confused and unsettled, it being contended in some cases that the rule which makes demand and notice essential to a recovery against a drawer or indorser does not apply in actions brought to recover a debt for which a bill or note has been taken in payment; and that want of demand and notice will not be a defense unless payment has actually been lost through the laches of the creditor.[4] But the holder of a bill or note taken for or on account of a precedent or cotemporaneous debt is

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Booth v. Smith, 3 Wend. 66; Byles on Bills (Sharswood's ed.) [*372], 551; 2 Parsons N. & B. 181, 154; Edwards on Bills, 198, 201, 445; Redfield & Bigelow's Lead. Cas. 637, 642; Huston v. Weber, 3 T. & C. (N. Y.) 147; 1 Hun, 120.

[1] Ibid.; Story on Bills, § 109; Story on Notes, § 117; Edwards on Bills, 445; Tobey v. Barber, 5 Johns. 68.

[2] Peacock v. Purcell, 14 C. B. N. S. 728; Edwards on Bills, 445.

[3] Lazier v. Nevin, 3 Hagans (W. Va.), 622.

[4] Gallagher's Exors. v. Roberts, 2 Wash. C. C. 191; Kephart v. Butcher, 17 Iowa, 240; see also Brooks v. Elgin, 6 Gill, 254; Cook v. Buck, 10 Humph. 412; Hamilton v. Cunningham, 2 Brock. 350. In 2 Am. Lead. Cas. 259, 260, the learned editors, after commenting on the cases, say: "The true view would seem to be that the failure of the creditor to pursue the usual course of business with reference to commercial instruments taken for a debt, is a *prima facie* bar to a suit for the debt itself, which may, notwithstanding, be removed by proving that the instrument was unavailable as a means of payment, and that the debtor has not been injured by the omission to present it at maturity and to give notice of its non-payment."

a holder for value. If he passes it to a third party, the parties are excluded from equitable defenses, and subjected to all the liabilities of parties to negotiable instruments; and thus exposed to the burdens, it seems but right that they should be entitled to exact all the privileges which attach ordinarily to their positions.

When, however, the transferrer indorses the bill or note merely as collateral security for or on account of a precedent debt, without any new consideration therefor, he is not entitled to require strict presentment and notice as an indorser; and the responsibility of the creditor is limited to the loss occasioned by his negligence in respect to presentment and notice.[1]

§ 1278. When the debtor transfers by delivery merely the bill or note of another for an antecedent debt, he is undoubtedly not entitled to require strict presentment and notice, as he is not a party to the instrument.[2] Still, by accepting the instrument in conditional payment, the creditor comes under an obligation to use due diligence in making it subserve the purpose for which it was given; and if by his delay and laches he loses the opportunity to collect and apply the proceeds, he cannot then enforce the original right of action against the transferrer.[3] But the burden of proof is on the defendant in an action on the original consideration to show that there had been laches on the creditor's part; for if the bill or note remains in his hands, it is presumptive evidence that it has been dishonored by nonpayment.[4]

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[1] 2 Am. Lead. Cas. 260.

[2] Story on Bills, § 109; Story on Notes, § 117.

[3] Tobey v. Barber, 5 Johns. 68; Dayton v. Trull, 23 Wend. 345; 2 Am. Lead. Cas. 256.

[4] Goodwin v. Coates, 1 Moody & R. 221; Bishop v. Rowe, 3 M. & Sel. 362; 2 Parsons N. & B. 183; Byles (Sharswood's ed.) [*272], 551. But see Dayton v. Trull, 23 Wend. 345.

SECTION IV.

THE EFFECT OF TAKING A BILL OR NOTE UPON A LIEN.

§ 1279. By the common law a party selling personal property has a right of lien for the purchase money as long as he retains possession of the property. A lien is simply a right to hold, and without possession there can be no lien.[1] The vendor's lien may be waived expressly. "It may also be waived by implication at the time of the formation of the contract, when the terms show that it was not contemplated that the vendor should retain possession until payment; and it may be abandoned during the performance of the contract, by the vendor's actually parting with the goods before payment."[2] The circumstances under which the lien will be regarded as waived are as follows: (1) In the *first* place, it will be regarded as waived by implication when the goods are sold on credit,[3] unless there be an express agreement to the contrary, or an established usage to the same effect in the particular trade of the parties be shown.[4] (2) In the *second* place, the vendor's lien will also be waived by taking a bill, note, or other security payable in future, for the goods bought.[5] A promissory note payable on demand, however, would not defeat the vendor's lien.[6]

§ 1280. But if the goods are permitted to remain in the vendor's hands until the bill or note given for them by the

[1] Heywood v. Waring, 4 Camp. 291.

[2] Benjamin on Sales, 598.

[3] Spartali v. Benecke, 10 C. B. 212; 19 L. J. C. P. 293.

[4] Field v. Lelean, 6 H. & N. 617; 30 L. J. Ex. 168; overruling on this point Spartali v. Benecke, *supra*.

[5] Chambers v. Davidson, L. R. 1 P. C. App. 296; 4 Moore P. C. C. N. S. 158. Lord Westbury saying: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights to the extent of the express contract that they have made. *Expressum facit cessare tacitum.*" Bunney v. Poyntz, 4 B. & Ad. 568 (24 E. C. L. R.); Barrett v. Goddard, 3 Mason, 107; Byles on Bills (Sharswood's ed.) [*385], 566.

[6] Clark v. Draper, 19 N. H. 419; *contra*, Hutchins v. Olcott, 4 Vt. 549.

buyer falls due, and it is then dishonored, the vendor's lien will be revived.[1] In such a case Lord Tenterden said: "We are all of the opinion that, on non-payment of the bill, the defendant ought to retain the goods."[2] Unless, indeed, the bill or note had been negotiated and were outstanding in the hands of a transferee, in which case the lien would not be revived by its dishonor.[3]

§ 1281. When real property is sold, the principle relative to personal property does not apply, and the acceptance of a bill or note, upon which no third person is security, even when it is negotiated to a third party by discount or otherwise, does not amount to a relinquishment of the vendor's lien on the land for the unpaid purchase money.[4] The master of the rolls said in an English case: "The effect of a security of a third person has never been decided; but I concur with Lord Redesdale that bills of exchange are not security but a mode of payment."[5] Nor will a check drawn on a bank by the vendee, which is not presented or paid, operate a relinquishment of the vendor's lien, nor any instrument whatever involving merely the vendee's responsibility.[6] In Kansas, where a note was given and indorsed, it was said by Brewer, J.: "The lien which the vendor has is something more than a bare right, a personal privilege. It is an interest created by the contract of the parties, and is as fixed, complete, and absolute as the interest of a mortgage. It is more, for the mortgagee has no estate in the land under the decisions of this court, while the vendor in a bond to convey, holds the legal title. It is a general rule that the inci-

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[1] New v. Swain, 1 Dans. & L. 193; Valpy v. Oakeley, 16 Q. B. 641; Dixon v. Yates, 5 B. & Ad. 341; Benjamin on Sales, 623.

[2] New v. Swain, 1 Dans. & L. 193.

[3] Bunney v. Poyntz, 4 B. & Ad. 568 (24 E. C. L. R.); Byles on Bills [*373], 553; 2 Parsons N. & B. 166.

[4] Magruder v. Peter, 11 Gill & J. 217; Tompkins v. Mitchell, 2 Rand. 428; Bayley v. Greenleaf, 7 Wheat. 46; *Ex parte* Loring, 2 Rose, 79; Hughes v. Kearney, 1 Sho. & L. 135; 1 Lomax Digest [218], 268; Byles on Bills [*374], 554.

[5] Grant v. Mills, 2 Ves. & B. 306; Story Eq. Juris. § 1226.

[6] Honore v. Blakewell, B. Mon. 67; Mims v. Macon, &c. R. R. Co. Kelly, 333.

dent follows the principal; the transfer of a debt carries with it the security. The vendor holds the legal title as security. He transfers the debt which is secured. Why may not the indorsee, the holder of the debt, avail himself of the security? In the case of a mortgage the rule is well settled. What is this but an equitable mortgage?"[1] And the ruling accorded with these views. If a negotiable note is drawn by the vendee, and indorsed by a third person, or drawn by a third person, and indorsed by the vendee, it will repel the lien presumptively.[2]

It has been held that taking a bond for the purchase money of land waives the vendor's lien;[3] but the better opinion is to the contrary, and that the bond is mere evidence of the debt.[4]

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[1] Stevens v. Chadwick, 10 Kansas, 406.

[2] Brown v. Gilman, 4 Wheat. 526; 1 Mason, 192; Foster v. Trustees, 3 Ala. 302; Burk v. Gray, 6 How. (Miss.) 527; Woods v. Bailey, 3 Fla. 41; Boon v. Murphy, 6 Blackf. 1272; Campbell v. Baldwin, 2 Humph. 248; White v. Dougherty, Mart. & Y. 309; 1 Lomax Digest [218], 269; *contra*, Magruder v. Peter, 11 Gill & J. 217.

In Brown v. Gilman, 4 Wheat. 255, Marshall, C. J., said: "The notes for which the vendors stipulated are to be indorsed by persons approved by themselves. This is a collateral security on which they relied, and which discharges any implied lien on the land itself for the purchase money." And in the same case, when before the lower court (1 Mason, 191), Story, J., said: "On a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee—as, for instance, a bond, or note with a security or indorser, or a collateral security by way of pledge or mortgage—that under such circumstances a lien exists upon the land itself."

[3] Fawell v. Heelis, 2 Amb. 724; Winter v. Anson, 1 Sim. & S. 434.

[4] White v. Casanove, 1 Har. & J. 106; Cox v. Fenwick, 3 Bibb, 183; Young v. Wood, 11 B. Mon. 23; Lagow v. Badollet, 1 Blackf. 416. Chancellor Kent has said on this subject in his Commentaries, vol. 4, sect. 58 [*153], "In several cases it is held that taking a bond from the vendee for the purchase money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived, but the weight of authority and better opinion is, that taking a note, bond, or covenants from the vendee for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are the only ordinary evidence of the debt. Taking a note, bill or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon independent security, and it discharges the lien."

When a note is given for purchase money of land, and is transferred by the vendor, the lien passes also to the transferee,[1] unless the indorsement were without recourse or the vendor who transfers guarantees the payment, in either of which cases the lien is defeated.[2]

§ 1282. In many of the States of the United States statutes have been enacted giving mechanics liens on the buildings or works constructed, for the amount of materials furnished and labor done upon them. And, as a general rule, it may be stated that such liens are not waived by the receipt, on the part of the mechanic, of a bill of exchange or negotiable promissory note for the amount of the debt which such lien secures.[3] Taking a bond even for such a debt would not be regarded as waiving such a lien. Additional securities are in their nature cumulative, and where parties have not expressly or impliedly so stipulated, there is no reason why the one should be regarded as a relinquishment of the other.[4]

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[1] Edwards v. Bohannon, 2 Dana, 98; Woods v. Bailey, 3 Fla. 41; Stevens v. Chadwick, 10 Kansas, 406; *ante*, § 1281; 15 American Rep. 352, 353; Buchanan v. Kimes, 58 Tenn. 275.

[2] Woods v. Bailey, 3 Fla. 41; Schnebly v. Ragan, 7 Gill & J. 120.

[3] Sweet v. James, 2 R. I. 270; Gable v. Gale, 7 Blackf. 218; Steamboat Charlotte v. Hammond, 9 Mo. 58; Mix v. Ely, 2 Greene (Iowa), 508; Mix v. Ely, 2 Id. 513.

[4] Kinsley v. Buchanan, 5 Watts, 118; Henchman v. Lybrand, 14 Serg. & R. 32.

CHAPTER XL.

DISCHARGES OF BILLS AND NOTES OTHER THAN BY PAYMENT.

SECTION I.

DISCHARGES BY OPERATION OF LAW.

§ 1283. Besides the discharge of all liability by payment, there may be other discharges by operation of law and by agreement between the parties. By operation of law the obligation of any party to the bill or note may be discharged: (1) By a general bankrupt or insolvent act of the State or country where the contract is made or is payable.[1] (2) By merger of the bill or note in a judgment thereon against the party or parties liable thereon. (3) By appointment of the maker or acceptor to the executor of the holder. (4) By gift or bequest of the bill or note to the maker or acceptor by last will. (5) By any matter which constitutes such discharge by the local law.

§ 1284. As between the parties thereto, a judgment on a bill or note operates as a merger of the indebtedness, and while other parties to the instrument may be sued upon it, the one against whom the judgment has been obtained is liable only under such judgment. The judgment extinguishes the bill or note as to the judgment debtor, but is no satisfaction so as to discharge other parties until paid.[2]

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[1] But the insolvent laws of a State have no extraterritorial force or effect. They are inoperative as to citizens of another State or territory, although the contract is to be performed within the State granting the discharge. Baldwin v. Hale, 1 Wall. 223; Soule v. Chase, 39 N. Y. 342; Pratt v. Chase, 44 N. Y. 597.

[2] Russell & Erwin Man. Co. v. Carpenter, 13 N. Y. S. C. (5 Hun), 164; Claxton v. Swift, 2 Show. 441; Tarleton v. Allhusen, 2 Ad. & El. 32; Story on Notes, § 409; 2 Parsons N. & B. 232; Byles on Bills (Sharswood's ed.) [*228], 372.

§ 1285. There are some other cases in which the debt may be extinguished by merger. Thus, at common law, if the creditor appoint his debtor executor, by the English law it operates at law as a release or extinguishment of the debt, provided there are other assets to pay the creditors' debt.[1] But this principle does not obtain in the United States. Where one of three acceptors is the holder of the bill at maturity, the liability to pay, and right to receive the money, concur in one person, and operates as performance and extinguishment of the contract.[2] So where an estate descends to the debtor as heir.[3] So a gift of the bill or note to maker or acceptor cancels it.[4]

§ 1286. A bill is not satisfied by bequest of a legacy by the drawer to the payee who is its holder.[5] But an entry by the testator who is holder of the bill, in his book that the maker of a note should pay no interest, and should not be called on for the principal, discharges it.[6]

SECTION II.

DISCHARGES BY AGREEMENT OF THE PARTIES.

§ 1287. By agreement between the parties a discharge may be effected: (1) By accord and satisfaction by receipt of some collateral thing from the maker or acceptor. (2) By a release from the holder to the maker or acceptor. (3) By a covenant never to sue the maker or acceptor on the instrument. (4) By agreement that another shall be substituted as the debtor. (5) By agreement that another security shall be taken in lieu of the bill or note. (6) By taking a higher security.

§ 1288. *First:* An accord and satisfaction, as between

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[1] Williams on Executors, 937; Freakley v. Fox, 9 Barn. & Cres. 130; Story on Bills, § 442; Story on Notes, § 407; Byles on Bills (Sharswood's ed.) [*54, 233], 140, 376.

[2] Harmer v. Steele, 4 Welsby H. & G. 1.

[3] Story on Bills, § 445.

[4] Stewart v. Hidden, 13 Minn. 43.

[5] Carr v. Eastabroke, 3 Ves. 561.

[6] Edon v. Symth, 5 Ves. 341, 350, note, citing Ashton v. Pye.

the maker or acceptor and the holder, by the giving and acceptance of some collateral thing in discharge of the bill or note, utterly extinguishes it. For whatever amounts to satisfaction of a bill or note by the acceptor or maker is satisfaction as to all parties who are collaterally liable. Satisfaction made by one partner of a firm, which are either makers or indorsers, discharges all the partners; and so where a person is partner in two firms, one of which are the makers, and the other indorsers of the note, satisfaction by him discharges both firms.[1] If an executory contract is the consideration of another executory contract, both may be mutually rescinded, the giving up one being the consideration for giving up the other.[2]

But a contract upon an executed consideration cannot be discharged either before[3] or after the breach,[4] save by a release, or by satisfaction for a valuable consideration. If the holder of a bill or note renounces his claim and gives up the instrument, the drawer and indorsers are as much discharged as by payment, and he cannot sue the maker or acceptor upon it. And having voluntarily relinquished the evidence of the debt, it may be doubted if he could sue the maker or acceptor at all.

§ 1289. A part payment of a bill or note which has fallen due only extinguishes it *pro tanto*, and an agreement that it shall be in full discharge of the debt does not make such part payment any more effectual as to the residue, there being no sufficient consideration for the discharge of the whole.[5] But any agreement by way of compromise,[6] or composition,[7] into which any new element entered, would be sustained, and if the claim were disputed, agreement to receive part payment in full would discharge it.

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[1] Atkins v. Owens, 4 Nev. & Man. 123. [2] King v. Gillet, 7 M. & W. 55.

[3] Byles on Bills (Sharwood's ed.) [*224], 367, note.

[4] Byles (Sharswood's ed.) [*225], 368; 2 Parsons N. & B. 235.

[5] Fitch v. Sutton, 5 East, 230; Pinnel's Case, 5 Co. 117; Price v. Cannon, 3 Mo. 453; Meyers v. Byington, 34 Iowa, 205; Missouri Loan Bank v. Garner, 1 Mo. App. 200; Rea v. Owens, 37 Iowa.

[6] Jenks v. Barr, 56 Ill. 450; 2 Parsons N. & B. 218.

[7] Murray v. Snow, 37 Iowa, 410.

Thus, if the part payment were before maturity,[1] or were made by a stranger,[2] or was made by a bill or note with a surety,[3] or collateral security,[4] or were in any way more advantageous to the creditor, it would suffice to support any agreement based upon it. As said, in Massachusetts, by Dewey, J.: "The same ancient authority which declares that the payment and acceptance of a less sum on the day the debt becomes due, in satisfaction of a greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction; for it is said, peradventure, parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material."[5] The same rule would apply if a number of notes, some of which were due and some of which were not due, were delivered up for less than face value;[6] and also if the old note were by agreement surrendered up for a new one, the contract then being executed.[7] Where suit had been brought on a note, and a compromise was effected, the holder agreeing to indorse on the note a credit of $50, if defendant would pay balance on a certain day; and under this agreement suit was dismissed, it was held, that on failure of defendant to pay the balance that the payee might erase the credit given.[8]

§ 1290. *Secondly:* A release is technically an instrument under seal, the seal importing a consideration. But the release of a party to a bill or note by any agreement, upon a valuable consideration, is as effectual as if made under seal.[9]

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[1] Bowker v. Childs, 3 Allen, 434; Brooks v. White, 2 Metc. 283; Whittle v. Skinner, 23 Vt. 231; Lee v. Oppenheimer, 32 Me. 253.

[2] Welby v. Drake, 1 Car. & P. 557; Thompson v. Percival, 5 B. & Ad. 925.

[3] Hardman v. Bellhouse, 9 M. & W. 596. [4] Lewis v. Jones, 4 Barn. & C. 506.

[5] Brooks v. White, 2 Metc. 283. [6] Bowker v. Childs, 3 Allen, 436.

[7] Draper v. Hill, 43 Vt. 439; Ellsworth v. Fogg, 35 Vt. 255.

[8] Chamberlin v. White, 79 Ill. 549.

[9] Benjamin v. McConnell, 4 Gilm. 536; Milliken v. Brown, 1 Rawle, 391; Nicholson v. Revill, 4 Ad. & E. 675; 6 Nev. & M. 192.

And it discharges a joint party, and all parties who are subsequent to the one released, and might have looked to him on making payment for reimbursement. It is not necessary that the releasor should be the holder of the instrument at the time of making the release.[1] But a release of a drawee before he accepts is no bar to a suit on his acceptance, for it can only operate on existing rights.[2]

If there is not a technical release under seal, which, as has been said, imports a consideration, no agreement can operate as a release, unless it is upon a sufficient consideration.[3] A verbal agreement of the payee of a note with the maker to release him, and accept a third party in his stead, who signs in pursuance of such agreement, is upon sufficient consideration, and is valid.[4]

§ 1291. *Thirdly:* A general covenant not to sue the maker or acceptor will operate as an extinguishment of the debt as to him,[5] and will, of course, operate as a discharge of the drawer and indorsers.[6] But such a covenant does not discharge another who is jointly liable with the covenantee;[7] nor will such a covenant not to sue, given by one of two creditors, operate as a release.[8] And a covenant not to sue for a limited time will not affect a release as between the parties (though it will discharge the sureties), unless it be stipulated that it may be pleaded in bar.[9] Nor will an agreement not to sue for a limited time discharge the party with whom it is made.[10]

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[1] Scott v. Lefford, 1 Camp. 246.

[2] Hartley v. Manton, 5 Q. B. 247; Ashton v. Freestun, 2 Man. & G. 1; 2 Scott N. R. 273; Brage v. Netter, 1 Ld. Raym. 65.

[3] Keeler v. Bartine, 12 Wend. 110.

[4] Carpenter v. Murphee, 49 Ala. 84.

[5] Story on Notes, § 409.

[6] Byles (Sharswood's ed.) 384.

[7] Dean v. Newhall, 8 Term. R. 168; Hutton v. Eyre, 6 Taunt. 289; Lacy v. Kinnaston, Holt, 178; 1 Ld. Raym. 688; Twopenny v. Young, 3 Barn. & C. 208; 2 Parsons N. & B. 238; Story on Notes, § 409; Story on Bills, § 431.

[8] Walmsley v. Cooper, 11 Ad. & E. 216; 3 Per. & D. 149.

[9] Drage v. Netter, 1 Ld. Raym. 65; Hartley v. Manton, 5 Q. B. 247; Ashton v. Freestun, 2 Man. & G. 1; Thimbleby v. Barron, 3 M. & W. 210; Byles (Sharswood's ed.) [*240], 385.

[10] Ford v. Beech, 11 Q. B. 842 (63 E. C. L. R.); Byles (Sharswood's ed.) [*230], 374.

§ 1292. *Fourthly and Fifthly:* The substitution of another debtor, or of another security for the bill or note, do not here require extended notice. They depend upon the agreements between the parties, and are governed by the general law of contracts.

§ 1293. *Sixthly:* A bill or note, or other simple contract debt, is merged in a bond or covenant taken for or to secure the claim, as against the party executing such bond or covenant, because in legal contemplation the specialty is an instrument of a higher nature, and affords a higher security and a better remedy than the original demand presented.[1] But this does not hold even in favor of a surety by simple contract, if it appear on the face of the subsequent deed that it was intended only as an additional or collateral security, and there is nothing in the deed itself expressly inconsistent with such intention.[2]

SECTION III.

DISCHARGE OF A JOINT PARTY.

§ 1294. A note may be the joint note of two or more parties, or it may be the joint and several note of two or more parties. A note simply joint is the single note of all the joint parties taken collectively. But the joint and several note of the same parties is one more than as many notes as the number of the signers, being the several note of each one of them and the joint note of all.[3]

Now, when the maker of a joint note, or a joint acceptor, or joint indorser, is discharged by a release or otherwise, all others jointly bound with him are discharged; for no separate suit against each, or joint suit against all, can be maintained in such a case. And besides the discharge of one by the holder deprives the others of the right of

[1] Story on Notes, § 409.

[2] Bowles v. Elmore, 7 Grat. 390.

[3] King v. Hoare, 13 M. & W. 505.

proportional relief by contribution, which they would otherwise become entitled to on making payment.[1]

§ 1295. An agreement with one partner to look to him only for the whole debt, if not for a valuable consideration, will not discharge him.[2] But if the holder accept from him a separate security in discharge of the social debt, that will be sufficient.[3] A release of one of two joint debtors will not discharge the others if the holder's rights against them be expressly reserved;[4] nor will a copartner be discharged by time given another if there be such a reservation.[5] Where one of three partners, after a dissolution of partnership, undertook to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held that the separate notes, having proved unproductive, he might still resort to his remedy against the other partners; and that the taking under these circumstances the separate notes, and even afterward renewing them several times successively, did not amount to satisfaction of the joint debt.[6]

§ 1296. A judgment against a joint promisor is a bar to an action against both,[7] and is also a bar to an action against

[1] Nicholson v. Revill, 6 Nev. & M. 192; 4 Ad. & El. 675; Brooks v. Stuart, 10 Ad. & El. 854; King v. Morrison, 2 Dev. 341; Harrison v. Close, 2 Johns. 448; Tuckerman v. Newhall, 17 Mass. 581; Boardman v. Paige, 11 N. H. 431; Robertson v. Smith, 18 Johns. 459; Byles (Sharswood's ed.) [*232], 375; Thomson on Bills, 387; Story, § 431; Story on Notes, §§ 425, 435; 1 Parsons N. & B. 247, 250; Edwards on Bills, 573, 574; Chitty (13th Am. ed.) [*416], 470, 472.

[2] Lodge v. Dicas, 3 Barn. & Ald. 611.

[3] Bedford v. Deakin, 2 Barn. & Ald. 210; Evans v. Drummond, 4 Esp. 89; Nicholson v. Revill, 4 Ad. & El. 675; Stephen v. Thompson, 2 Wms. 77; Story on Bills, § 431; Byles (Sharswood's ed.) [*48], 132.

[4] Kearsley v. Cole, 16 M. & W. 128; Price v. Barker, 4 El. & Bl. 760; Thomson on Bills, 387; 1 Parsons N. & B. 249.

[5] Lodge v. Dicas, 3 Barn. & Ald. 611; Crawford v. Millspaugh, 13 Johns. 87.

[6] Bedford v. Deakin, 2 B. & Ald. 210; 2 Stark. 173.

[7] Robertson v. Smith, 18 Johns. 459; King v. Hoare, 13 M. & W. 494; Ward v. Johnson, 13 Mass. 148; 1 Parsons N. & B. 249. But see Sheehy v. Mandeville, 6 Cranch, 253; Higgin's Case, 6 Co. R. 45; 2 Parsons N. & B. 252.

the other.[1] But where the liability is joint and several, a judgment against one does not preclude procedure against the other or others.[2]

A covenant not to sue one of two or more joint makers, does not discharge or release the others, being regarded as a mere personal covenant.[3] Nor does part payment by one joint debtor discharge another;[4] nor the mere taking of security from one.[5]

§ 1297. Upon the same principle that a covenant not to sue a joint party will not operate as a discharge of other joint parties, the giving of time to one,[6] or proceeding in a suit against one even to judgment,[7] but without satisfaction, it has been thought, will be no discharge of the other joint parties; but the better opinion is that judgment against one joint party bars proceedings against all other parties who are joint, and not also several.[8]

§ 1298. At common law it is the settled doctrine that in case of a joint obligation, if one of the obligors die, his representative is at law discharged, and the survivor alone can be sued.[9] And it seems to be equally well settled, that if the joint obligor so dying be a surety not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable,[10] and this is the case even though in the surety's life-

[1] King v. Hoare, 8 Jur. 1127 (1844); 13 Mees. & W. 494; Holman v. Langtree, 40 Ind. 349; Byles (Sharswood's ed.) [*228], 372; see Story on Notes, § 409.

[2] Story on Bills, § 428; see U. S. v. Cushman, 2 Sumner, 310, 426; Byles (Sharswood's ed.) [*228], 372.

[3] Twopenny v. Young, 3 Barn. & C. 208; Mallet v. Thompson, 5 Esp. 175; Story on Notes, §§ 409, 421, 425.

[4] Ruggles v. Patten, 8 Mass. 480.

[5] Bedford v. Deakin, 2 B. & Ald. 210; Thomson on Bills (Wilson's ed.) 393.

[6] Draper v. Wild, 13 Gray, 580; Story on Notes, §§ 409, 421; Story on Bills, § 428.

[7] See Sheehy v. Mandeville, 6 Cranch, 253; and Story on Notes, § 409, note 7.

[8] *Ante*, § 1296; Story on Notes, § 409.

[9] Getty v. Binsse, 49 N. Y. 388; Towers v. Moor, 2 Vern. 98; Simpson v. Vaughan, 2 Atk. 31; Harrison v. Field, 2 Wash. (Va.) 136; Other v. Iveson, 3 Drew. Ch. R. 177.

[10] Getty v. Binsse, 49 N. Y. 388; Simpson v. Field, 2 Cases in Ch. 22.

time there was a joint judgment against him and his coprincipal.[1] In many of the States statutes have changed this principle, but in others it is still preserved. In such cases where the surety owes no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his liability. He signs a joint contract, and incurs a joint liability, and no other; and dying prior to his comaker, the liability attaches to the survivor alone.

SECTION IV.

DISCHARGE OF PARTNERSHIP DEBT BY BILL OR NOTE OF ONE PARTNER.

§ 1299. The doctrine is now regarded as sound and well settled as a general rule (though there has been vacillation, and difference of opinion on the question), that the giving of the separate bill or note of one of several partners for a copartnership debt, is good consideration for the discharge of the other partners. For it may be advantageous to the creditor in various ways; it avoids difficulties which might arise from suing the debtor with other defendants; in the event of his bankruptcy it would have priority over joint debts in England; and it may be more convenient and satisfactory to the creditor in the pursuit of his remedy, whether in equity or at law.[2]

§ 1300. But where one partner's bill or note is taken for a partnership debt, it may be as collateral security merely, with the original liability expressly retained.[3] And the burden of proof is upon the party who alleges it, to

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[1] Risley v. Brown, 67 N. Y. 160.

[2] Thompson v. Percival, 5 B. & Ad. 925; Reed v. White, 5 Esp. 122; Evans v. Drummond, 4 Esp. 89; Powell v. Charless, 34 Miss. 485; Nicholas v. Chcairs, 4 Sneed, 231; Arnold v. Camp, 12 Johns. 410; Van Epps v. Dillaye, 6 Barb. 244; Waydell v. Luer, 3 Denio, 510 (overruling same case, 5 Hill, 448, and Cole v. Sackett, 1 Hill, 516); see Sheehy v. Mandeville, 6 Cranch, 264; Edwards on Bills, 194, 195; 2 American Lead. Cas. 248; Byles (Sharswood's ed.) [*371], 550; 2 Parsons N. & B. 199.

[3] 2 Parsons N. & B. 201.

show that the partner's separate bill or note was taken in extinguishment of the copartnership debt.[1] In Massachusetts a different view prevails.[2] When one partner's note is taken, and the partnership note given up, it has been held that no absolute legal presumption of extinguishment is raised;[3] but it is a circumstance of great weight, to be judged of by the jury, or the court to which the question is submitted; and unexplained, would suffice, we should say, as *prima facie* evidence of extinguishment.[4] Especially would this be the case if the firm were dissolved, and the transaction was without consent of the other partner.[5]

§ 1301. Where no new security is taken, a mere promise to look to one partner only, or that one only should assume the debts, is not binding, because without consideration.[6] But if third parties were induced to enter into an arrangement on the faith of such a promise, it would be otherwise. And it has been urged that when the partner seeking to be discharged is shown to have altered or varied his situation on the faith of such agreement, the rule would be different also.[7] When two or more persons, not partners, are jointly indebted, the individual note of one will operate as a discharge of both, if so agreed between the parties;[8] but such agreement will not be presumed, and must be distinctly proved.[9]

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[1] Parker v. Cousins, 2 Grat. 372; Thompson v. Briggs, 8 Fost. 40; Estate of Davis, &c. 5 Whart. 530; Arnold v. Camp, 12 Johns. 409; Muldon v. Whitlock, 1 Cow. 290; Edwards on Bills, 192; *ante*, § 1295.

[2] French v. Price, 24 Pick. 13.

[3] Powell v. Charless, 34 Miss. 485.

[4] Arnold v. Camp, 12 Johns. 409.

[5] Stone v. Chamberlin, 20 Ga. 262.

[6] Lodge v. Drias, 3 B. & Ald. 611.

[7] 2 Am. Lead. Cas. 249.

[8] Myatts v. Bell, 41 Ala. 222.

[9] Bowers v. Still, 49 Penn. St. 475; Schollenberger v. Seldenridge, Ib. 83.

CHAPTER XLI.

WHAT DISCHARGES A SURETY.—THE LAW OF PRINCIPAL AND SURETY IN ITS APPLICATION TO BILLS AND NOTES.

§ 1302. In the chapter on "Payment and other Discharges" have been considered the matters which operate as a discharge of liability of the maker and acceptor of a negotiable instrument, with incidental reference to the effect of such matters on the liability of the drawer and indorsers. But there are other matters which discharge the drawer and indorsers that deserve especial attention, as their relations to the holder of the instrument are very different from those of the maker or acceptor. These matters may be conveniently discussed under the head of "The Law of Principal and Surety in its Application to Bills and Notes." And under that heading will also be appropriately embraced those cases in which the party signs a negotiable instrument describing himself as surety; or is known to be such, although signing as a joint or several promisor.

SECTION I.

WHO ARE PRINCIPALS AND WHO SURETIES—AND GENERAL PRINCIPLES OF SURETIES' LIABILITIES.

§ 1303. In the *first* place, as to who are to be regarded as principals, and who as sureties. The acceptor of a bill and the maker of a note, when the acceptance is made or note executed upon a valuable consideration, are undoubtedly principals as to all the parties thereto. And the drawer of such a bill, and the indorsers of such a bill or note, are sureties of the acceptor or maker to the holder.[1] But though

[1] Clark v. Devlin, 3 Bos. & P. 363; Wallace v. M'Connell, 13 Pet. 136; Blair v. Bank of Tennessee, 11 Humph. 84; Chitty (13th Am. ed.) [*411], 463.

all the parties to such a bill are sureties of the acceptor, they are not as between themselves cosureties, liable for contribution to each other in the event that any one should pay the amount for the acceptor; but each prior party is a principal as between himself and each subsequent party. Thus, if the bill were payable to the drawer's order, and accepted, and then indorsed by the drawer and two subsequent indorsers successively, to the holder, the drawer and indorsers would be sureties of the acceptor to the holder. But as between the holder and the drawer, the drawer is principal debtor, and the indorsers sureties. As between the holder and second indorser, the second indorser is principal, and the third indorser is surety.[1]

If the drawer and indorser of a bill for the acceptor's accommodation agree that each shall pay one-half the bill, if the acceptor fail to pay, they are joint sureties; and if either one pay the whole amount, he may recover half from the other.[2]

§ 1304. In New York it has been held, that while an indorser is in the nature of a surety, he is answerable upon an independent contract, and it is his duty to take up the bill when dishonored; and that the rule, adopted in that State, that a surety may call upon the creditor to prosecute the principal, did not extend in its privilege to an indorser, though he could show any act impairing his right to resort against the principal in exoneration of himself from his engagement to the creditor.[3]

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[1] Newcomb v. Raynor, 21 Wend. 108; Byles on Bills (Sharswood's ed.) [*236], 379; Edwards, 565.

[2] Edelen v. White, 6 Bush (Ky.), 408.

[3] Trimble v. Thorn, 16 Johns. 152 (1819); Beardsley v. Warner, 6 Wend. 613 (1831).

In the case of a non-negotiable note, the assignee must sue the maker before he can resort to the assignor. Lee v. Love, 1 Call, 497; Bronaugh v. Scott, 5 Call, 78; Perrin v. Broadwell, 3 Dana, 596; Huntington v. Harvey, 4 Conn. 125; Bishop v. Yeazle, 6 Blackf. 127; Ricketson v. Wood, 10 Mo. 547. These and other cases are quoted by Professor Parsons (2 Parsons N. & B. 244) for the doctrine that the indorsee of a negotiable note loses his recourse against the maker by neglect to sue. But they do not so hold, their application being limited to

§ 1305. The fact that the liability of the drawer or indorser is fixed by due demand and notice, does not alter their relation as sureties of the debt; it simply fixes their liability as sureties for its payment, provided nothing is done by the creditor to exonerate them. This view is established by great weight of authority, and may be regarded as settled.[1] Professor Parsons regards some New York cases as maintaining a different doctrine—that after demand and notice the drawer and indorser become definitely liable as principals.[2] This view is a just deduction from these cases, but they did not so expressly decide, but only that the indorser is not a surety entitled to require the holder to sue as sureties might do under the New York law.[3]

When, however, a final judgment has been entered against the drawer or indorser, the relation of suretyship ceases, and his liability is merged in that of a principal judgment debtor.[4]

§ 1306. As a general rule whatever discharges the maker or acceptor of a bill or note discharges the drawer and indorsers who are sureties, for the contract which they undertook to assure thus passes out of existence by the act of the beneficiary. He cannot discharge the party primarily bound for the performance of an engagement, and then insist that another shall stand responsible for its performance. Besides, the drawer or indorser, on making payment for the maker or acceptor, would be entitled to the holder's remedies

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the resort of an assignee of a non-negotiable note against his assignor. There are, however, statutory provisions in some of the States which require prompt recourse against the principal before pursuing the indorser.

[1] Clark v. Devlin, 3 Bos. & Pul. 365; English v. Darley, 2 Id. 61; Gould v. Robson, 8 East, 576; Veazie v. Carr, 3 Allen, 14; Bank U. S. v. Hatch, 6 Pet. 250; Burrill v. Smith, 7 Pick. 291; Lobdell v. Niphler, 4 La. O. S. 295; Hefford v. Morton, 11 Id. 117; Millaudon v. Arnons, 15 Mart. 596; Wood v. Jefferson Co. Bank, 9 Cow. 194; Hubbly v. Brown, 16 Johns. 70; Story on Notes, § 413; Story on Bills, § 425; 2 Parsons N. & B. 243, 244; Edwards, 569.

[2] 2 Parsons N. & B. 243.

[3] Trimble v. Thorn, 16 Johns. 152; Beardsley v. Warner, 6 Wend. 613; Warner v. Beardsley, 8 Wend. 202, Seward, Senator, *quære*.

[4] Bray v. Manson, 8 Mees. & W. 668, Parke, B.; Baker v. Flower, 5 Jur. 655. It is otherwise in Texas by statute. Pasch. Dig. art. 4789; Parker v. Nations, 33 Tex. 210.

against him; and if the holder has discharged him from his obligation, the drawer or indorser would be remediless and have no resort for reimbursement.[1]

Upon this principle, where the holder of a note sued the maker and recovered judgment, and afterward sued the indorser for a balance of interest, it was held that the latter suit could not be maintained; for the maker was discharged by the first suit from all further liability, on the principle *nemo debet bis vexari eadem causa*, and therefore there could be no remedy against the indorser.[2] There are some cases, however, in which the principal may be discharged and the surety be still bound. Thus, if a party became surety for a married woman whose note is void because she could not make such a contract, the surety will nevertheless be bound, there being no fraud, duress, or deceit in the procuration of the note;[3] but it would be otherwise if either of these elements entered into the transaction.[4] How far an indorser is bound, though the maker may not be, has been elsewhere considered.[5]

§ 1307. We have already seen that whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him, but from which his discharge precludes them.[6] It follows from the same reasoning that discharge of a subsequent indorser can discharge no prior party; for such subsequent indorser could, under no circumstances, be liable to such prior party.[7] The contracts of the several indorsers are like

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[1] Sargent v. Appleton, 6 Mass. 85; Couch v. Waring, 9 Conn. 261; Byles on Bills (Sharswood's ed.) 378, 386.

[2] Couch v. Waring, 9 Conn. 261.

[3] Davis v. Staats, 43 Ind. 103.

[4] Osborn v. Robbins, 36 N. Y. 365.

[5] See vol. 1, §§ 669–679, especially § 675.

[6] Newcomb v. Raynor, 21 Wend. 108.

[7] Claridge v. Dalton, 4 M. & S. 232; English v. Darley, 2 Bos. & P. 61; Smith v. Knox, 3 Esp. 46; Bank U. S. v. Hatch, 6 Pet. 250; White v. Hopkins, 3 Watts & S. 99; Lynch v. Reynolds, 16 Johns. 41; Thomson on Bills, 393; Story on Notes, §§ 420, 423, 434; Story on Bills, § 429.

so many links of a pendant chain; if the holder dissolves the first, every link falls with it. If he dissolves an intermediate link, all after it are likewise dissolved. But the last link supports nothing, and its dissolution injures no one.[1]

SECTION II.

WHAT ACTS OF CREDITOR DISCHARGE A SURETY FOR THE DEBT.

§ 1308. We may enumerate as matters which will discharge a surety: (1) Misrepresentation or concealment to induce his becoming surety. (2) Diversion of the instrument from the agreed purpose. (3) Alteration of the instrument. (4) Payment. (5) Release. (6) Satisfaction. (7) Covenant not to sue a prior party. (8) Parting with security for the debt. (9) Agreement to indulge prior party by extension of time or forbearance of suit.

§ 1309. (I, II and III.) *As to misrepresentation, concealment, diversion, and alteration.*—The contract of suretyship is a contract *uberrimæ fidei.* Therefore where one is induced to become surety for another, as drawer of a bill, or indorser of a note for accommodation, or otherwise, and there is any misrepresentation or fraudulent concealment of a material fact, which, if known, would have induced the drawer or indorser or other surety not to enter into the contract, his contract is void from the beginning as between the surety and all parties privy to such misrepresentation or concealment.[2] Any essential vice in the obligation of the principal which may suffice to annul it is as available to the surety as to him, unless the surety be also the assignor, in which case he is estopped from setting up the antecedent defect.[3] If the payee is neither cognizant of, nor participates

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[1] See Edwards on Bills, 570.

[2] Hamilton v. Watson, 12 C. & F. 109; North British Ins. Co. v. Lloyd, 10 Exch. 523; Solser v. Brock, 3 Ohio St. 302; Evans v. Keeland, 9 Ala. 42; Byles (Sharswood's ed.) 377.

[3] Putnam v. Schuyler, 11 N. Y. S. C. (4 Hun), 168.

in the fraud, he is not affected by it.[1] Any fraud which deceives the surety after he has become a party releases him.[2] And where a bill is drawn or accepted, or a note made or indorsed for accommodation, with an agreement that it shall be used for a particular purpose, any diversion in its use operates a discharge of the accommodation party as to all other parties who have knowledge of such diversion.[3] But this subject is elsewhere more fully considered.[4] So alteration is elsewhere treated.[5]

If the holder inform an indorser that the bill has been paid by the acceptor, which statement is untrue, he cannot afterward sustain an action against the indorser, though his liability was duly fixed, if in the mean time any party against whom the indorser could have had recourse for payment has become insolvent.[6]

§ 1310. (IV) *Payment* by the maker or acceptor of course discharges the drawer and indorsers.[7] (V) So also does a release.[8] But if there were in the release an express reservation of the holder's rights against the drawer and indorsers, they would not be discharged, their rights and remedies against the maker or acceptor being thus reserved by implication.[9] (VI) Whatever amounts to satisfaction of the bill or note by the maker or acceptor, operates as an absolute discharge of all parties collaterally liable.

There is a distinction between extinguishment and satisfaction. The holder's claim may be extinguished as to an indorser or drawer, and the debt yet unsatisfied. But if there is satisfaction by one, it operates as to all.[10] (VII) A

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[1] Anderson v. Warne, 71 Ill. 20.

[2] Harris v. Brooks, 21 Pick. 122.

[3] Dewey v. Cochran, 4 Jones, 184; Southerland v. Whitaker, 5 Jones, 5; 1 Parsons N. & B. 236.

[4] See Chapter XXIV, §§ 790, 796, vol. 1.

[5] See Chapter XLIII, on Alteration, vol. 2.

[6] Petrie v. Feeter, 21 Wend. 171.

[7] See Chapter XXXVIII, on Payment, *ante*, p. 224.

[8] Byles on Bills [*240]. 384.

[9] Gloucester Bank v. Worcester, 10 Pick. 528; Stewart v. Eden, 2 Cai. 121; Tombeckbe Bank v. Stratton, 7 Wend. 429; Story on Bills, § 429.

[10] Story on Notes, § 403; 2 Parsons N. & B. 252.

covenant not to sue a prior party discharges the surety, because it disables him from suing should he pay the debt.

§ 1311. (VIII) *As to the creditor's parting with security for the debt.*—Upon making payment of the debt, the surety is undoubtedly entitled to all the rights, remedies and securities which the creditor could have enforced.[1] And while the creditor may not only abstain from active measures, but may even relinquish steps already commenced,[2] he must do nothing which can impair the rights and remedies of the surety. Therefore, if any collateral security which the creditor held be released, or a judgment lien given up, or a levy withdrawn, the surety is discharged.[3] But the withdrawal of an execution from the hands of the sheriff before a levy will not discharge the surety.[4] Nor will an ommission to revive a judgment, by means of which the lien and the land are lost;[5] nor discontinuance of steps to foreclose a mortgage.[6] But neglect to record a mortgage, whereby its value is lost, would discharge the surety,[7] and this even though the original mortgage would have been worthless, if recorded, by reason of prior liens.[8]

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[1] Williams v. Price, 1 Sim. & St. 581; *ex parte* Mure, 1 Coxe, 93; King v. Baldwin, 2 Johns. Ch. 317; Humphrey v. Hitt, 6 Grat. 509; Hayes v. Ward, 4 Johns. Ch. 123; Sullivan v. Morrow, 4 Ind. 425; Smith v. Jay, 23 Vt. 656; Muirhead v. Kirkpatrick, 9 Harris, 237; Byles (Sharswood's ed.) [*246–7], 392; 2 Am. Lead. Cas. 348.

[2] Bellows v. Lovell, 5 Pick. 307; Lawson v. Sayder, 1 Md. 171; Commissioners v. Ross, 3 Bin. 250; Montpelier Bank v. Dixon, 4 Vt. 399.

[3] Commonwealth v. Haas, 16 S. & R. 252; Farmers' Bank v. Reynolds, 13 Ohio, 84; Mayhew v. Boyd, 5 Md. 102; Ferguson v. Turner, 7 Mo. 497; Sneed v. White, 3 J. J. Marsh. 525; Mayhew v. Crickett, 2 Swans. 193; Winston v. Yeargin, 50 Ala. 340; Woodward v. Walton, 7 Heisk. 50; Clopton v. Spratt, 52 Miss. 251; Case v. Hawkins, 53 Miss. 702, (an accommodation indorser.) 5 Rob. Prac. (new ed.) 766; 1 Parsons N. & B. 242; see cases cited above in note 1; Byles on Bills [*241], 386.

[4] Humphrey v. Hitt, 6 Grat. 509; Lenox v. Prout, 3 Wheat. 520; Alcock v. Hill, 4 Leigh, 622; M'Kenny v. Waller, 1 Leigh, 434; Sawyer v. Bradford, 6 Ala. 572; Morrison v. Hartmann, 2 Harris, 416.

[5] U. S. v. Simpson, 3 Penn. 437; Farmers' Bank v. Reynolds, 13 Ohio, 84.

[6] Butler v. Gambs, 1 Mo. App. 466.

[7] Barr v. Boyer, 2 Neb. 265.

[8] Atlanta Nat'l Bank v. Douglas, 51 Ga. 205 (1874), McCay, J.: "The

But the surety will not be discharged in any case where it can be clearly proved that the act of the creditor has worked no real injury. And he is discharged only to the extent that he would be injured if held bound.[1] Thus withdrawal of a levy on property only entitles the surety to a credit for the value of the property levied on.[2]

Where the payee, receiving from maker before maturity an order on the indorser, gave up the note, but on dishonor of the order demanded it back, it was held the indorser could not be injured, and therefore was not discharged.[3]

§ 1312. (IX) *Extension of time, or forbearance of suit.*— The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs or delays the remedies which the creditor may resort to for its assurance or enforcement. For, whenever the creditor relaxes his hold upon the principal debtor, he impairs the hold upon him which the surety would acquire by substitution in his place on making payment; and good faith and fair dealing require that the surety should not be exposed to the injuries which might thus be inflicted upon him.[4] In the immense majority of cases the act done does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it.[5]

Extension of time for payment is the most frequent form

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failure of the principal to record, the loss of the lien, in this case, the destruction of the mortgage, is a change in the terms of the security's undertaking. He only guarantees the notes as security by the mortgage, and when the mortgage was destroyed, his contract was no longer existent; its terms were broken," distinguishing and explaining. Toomer v. Deckerson, 37 Ga. 428.

In Union Nat'l Bank v. Cooley, 27 La. Ann. 202, it was held, that surrender of a void and valueless collateral did not release surety.

[1] Payne v. Commercial Bank, 6 Smedes & M. 24; Loomis v. Fay, 24 Vt. 240; Neff's Appeal, 9 Watts & S. 36.

[2] Ward v. Vass, 7 Leigh, 135.

[3] Smith v. Harper, 5 Cal. 330.

[4] Thomson on Bills, 390.

[5] Swire v. Redman, 1 Q. B. Div. 536 (1876).

in which the creditor so deals with the principal as to discharge the surety; and whenever such indulgence is granted in pursuance of a binding legal contract, the surety is at once released from his obligations. And the same effect follows (the discharge of the surety) if time is given to one of the joint makers of a note of which the surety is indorser.[1] If the debtor takes a time draft, or a renewal note from the principal, the presumption is that right of action is suspended, and time of payment extended to its maturity, and an indorser of the original bill or note, is thereby presumptively discharged.[2]

§ 1313. The reason why extension of time of payment discharges the surety is that he would be entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor, without the surety's assent, disables himself from suing when he would be otherwise entitled to do so, and thus deprive the surety, on paying the debt, from immediate recourse on his principal, the contract is varied to his prejudice—hence he is discharged.[3] But this principle on which sureties are released "is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured."[4] Therefore, when there is a legal impossibility of injury, the principle does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt; and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the indorser, because the latter could not, by making payment, have recourse against him.[5]

§ 1314. While, as a general rule, whatever discharges the principal discharges the surety, the principal may sometimes have a defense which is not available to the surety. Where

[1] Story on Notes, § 414.

[2] Pomeroy v. Tanner, 70 N. Y. 547. See *post*, § 1329, and cases cited.

[3] King v. Baldwin, 2 Johns. Ch. 559.

[4] 6 How. 283.

[5] Tiernan's Exr's v. Woodruff, 5 McLean, 350.

one signs a joint and several note with a married woman as surety, her plea of coverture will be no defense to him.[1] So if a corporation made a note which was in excess of its legal power, a surety therein would nevertheless be bound.[2] And the indorser of a note on which the maker's name is forged, or of which the maker is an infant or married woman, is liable thereon, because he guarantees the instrument *in toto*.[3] And one who signs a note as principal, but is in reality a surety, and so known to the holder—signing after others whose names are forged upon the note, and while it is in the hands of the beneficiary—affirms the genuineness of the forged signatures, and cannot deny them unless the holder was privy to the fraud.[4]

§ 1315. The following elements or circumstances must unite in order to constitute an indulgence of this character: *First*, a consideration, for without it the promise would not be binding. *Second*, a promise or agreement to indulge, for without it the hands of the creditor are not tied, although he may have received collateral security for the debt. *Third*, the promise must not be altogether indefinite, for an indefinite promise of forbearance is void and nugatory, since it might be for an hour, which would be of no advantage to the debtor. *Fourth*, the indulgence must be without the surety's assent, for if he assents he is a party to it. *Fifth*, the indulgence must be without reservation of remedy against the surety, for that would reserve the surety's recourse on his principal. *Sixth*, the agreement must be with the principal, and not with a stranger.

§ 1316. *First, as to the consideration.*—There must undoubtedly be a consideration for the promise to indulge, and if the agreement be merely voluntary, the surety is not discharged. Mere indulgence at the will of the creditor, extended to the debtor, in no wise impairs the obligation of

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[1] Smyley v. Head, 2 Rich. 590.

[2] Conn v. Coburn, 7 N. H. 368.

[3] See *ante*, § 675, vol. 1.

[4] Selser v. Brock, 3 Ohio St. 302. See *ante*, § 672, vol. 1.

the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of the paper. It is well settled that there must be a valid common law agreement, in binding legal form, to give time to the maker or acceptor in order to effect the discharge of the drawer or indorser.[1] Therefore where the executrix of an estate verbally promised to pay the holder out of her own estate, if he would forbear to sue, the drawer was held to be still bound, because the contract was not binding under the statute of frauds.[2] Mere delay, even where the holder insists on interest, will not discharge the surety.[3]

§ 1317. But an agreement to forbear suit, made in consideration of a usurious premium, which has been executed by payment of the premium and by forbearance accordingly, would discharge the drawer or indorser;[4] and such, it has been held, would also be its effect if the usurious contract were executory, on the ground that in such a case the creditor places himself under a moral obligation, based upon a consideration which is beneficial to him, and which he recognizes as binding; and to permit him to take advantage of his own wrong, would enable him to profit doubly by his illegal action.[5] But the weight of authority is against this view.[6]

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[1] McLemore v. Powell, 12 Wheat. 554; Bank of Utica v. Ives, 17 Wend. 501; Crawford v. Millspaugh, 13 Johns. 87; Davis v. Graham, 29 Iowa, 514; Galbraith v. Fullerton, 53 Ill. 126; Buckalew v. Smith, 44 Ala. 638; Payne v. Commercial Bank, 6 Smed. & M. 24; And v. Magruder, 10 Cal. 282; Hazard v. White, 26 Ark. 155; Byles (Sharswood's ed.) 385; Story on Notes, § 419; Story on Bills, § 426; Parkhurst v. Vail, 73 Ill. 343; *ex parte* Balch, 2 Low, 440; see *post*, § 1326.

[2] Philpot v. Briant, 4 Bing. 717.

[3] Philpot v. Briant, 4 Bing. 717. See Story on Bills, § 425. But see Rose v. Williams, 5 Kansas, 483.

[4] Armistead v. Ward, 2 Pat. & H. 504; Kenningham v. Bedford, 1 B. Mon. 325; Kyle v. Bostwick, 10 Ala. 589; Vilas v. Jones, 10 Paige, 76; Harbert v. Dumont, 3 Ind. 346; Redman v. Deputy, 26 Id. 338; Cross v. Wood, 30 Id. 378; Abel v. Alexander, 45 Ind. 523.

[5] Armistead v. Ward, 2 Pat. & H. 504; Corielle v. Allen, 13 Iowa, 289.

[6] Vilas v. Jones, 1 Comst. 274; McComb v. Kittridge, 14 Ohio, 348; Abel v. Alexander, 45 Ind. 523; Braman v. Hawk, 1 Blackf. 392; Naylor v. Moody, 3

It has been held, that, where by statute, a bonus paid for forbearance to sue is necessarily applied as part payment, an indorser will not be discharged, because no legal obligation not to sue is created;[1] and that a promise by the maker to pay a greater rate of interest on the note, being without consideration, does not discharge an indorser.[2] In the absence of such a statute an agreement to pay a greater rate of interest would discharge the indorser.[3] The payment of legal interest in advance will uphold an agreement for forbearance, and discharge the surety,[4] and a note for the interest will be equal to its payment in advance.[5] Whether an agreement to pay the same rate of interest will support the stipulation to forbear, is a question on which authorities differ. Some consider that it will;[6] others that it will not,[7] which latter is, as we think, the better opinion.

§ 1318. *Second: The promise must be absolute.*—There must be an absolute agreement for indulgence by extension of time or forbearance to sue; for an agreement based upon a condition which is uncomplied with is not binding, and therefore does not discharge those who occupy the relation of sureties, but leaves all parties unaffected.[8] So an unaccepted offer is inchoate and ineffectual.[9]

Blackf. 92; Coman v. The State, 4 Blackf. 241; Meiswinkler v. Jung, 30 Wis. 361 (1872); Tudor v. Goodloe, 1 B. Mon. 324; Scott v. Hall, 6 B. Mon. 127; Patton v. Shanklin, 14 B. Mon. 17; Halstead v. Brown, 17 Ind. 202; Smith v. Hyde, 36 Vt. 306; Burgess v. Dewey, 36 Vt. 618.

[1] Nightingale v. Meginnis, 34 N. J. (5 Vroom), 461. See Fernan v. Doubleday, 3 Lans. 216.

[2] Schlussel v. Warren, 2 Oregon, 18.

[3] Kittle v. Wilson, 7 Neb. 84.

[4] 2 Hare & Wallace Lead. Cas. 469. But it is held such agreement is not presumed. First Nat. Bank v. Leavitt, 65 Mo. 563; *contra*, Crosby v. Wyatt, 10 N. H. 322.

[5] Gahn v. Niemcewicz, 11 Wend. 312.

[6] Pierce v. Goldberry, 31 Ind. 52; (overruled in Abel v. Alexander, 45 Ind. 523); Chute v. Pattee, 37 Me. 102; Comb v. Kittridge, 14 Ohio, 348; (overruled in Jones v. Brown, 11 Ohio St. 601).

[7] Harter v. Moore, 5 Blackf. 367; Stuber v. Schack, 83 Ill. 192, Schoefield, J.: "The promise to pay interest being merely a promise to do that for which the party was already liable" is not a sufficient consideration.

[8] Hansberger v. Geiger, 3 Grat. 144; Norris v. Cumming, 2 Rand. 323.

[9] Hewet v. Goodrick, 2 Car. & P. 468; Badnall v. Samuel, 3 Price, 521; Thomson on Bills, 395.

§ 1319. *Third: The indulgence must not be indefinite.*— The promise or agreement to indulge the principal must specify some definite time, or, at least, be not indefinite; for otherwise the time might be so short (as an hour, for instance) as to be of no advantage to the debtor.[1] And the indulgence must be for a period longer than that which would be required by law for judgment to be obtained, otherwise, though upon a valid consideration, the surety will not be discharged.[2] Thus, where it was agreed that the right of action should be suspended, but also that in case of any default the holder should have judgment at as early a period as he could have obtained it had he pursued his legal remedy, the surety was held not to be discharged.[3]

So, taking a *cognovit* from the acceptor, payable as early as a judgment could otherwise be obtained, does not exonerate the drawer or indorsers.[4] It would be otherwise if the postponement were beyond the period when judgment could be regularly obtained.[5] And the general rule above stated applies only to cases where time has been given after suit brought, and does not apply where time is given by contract before any action has been commenced.[6]

§ 1320. An agreement for continuance of a case to another term of court, based on a valuable consideration, would discharge the drawer or indorser of the bill or note in suit, because it would operate as a suspension of any remedy for the debt for the stipulated period.[7] But if merely by consent and without consideration, it would not have this effect.[8]

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[1] Alcock v. Hill, 4 Leigh, 622; Gardner v. Watson, 13 Ill. 347; Miller v. Stem, 2 Penn. St. 286; Blackstone Bank v. Hill, 10 Pick. 133; Parnell v. Price, 3 Rich. 121; Menifee v. Clark, 35 Ind. 304; Abel v. Alexander, 45 Ind. 523.

[2] Sizer v. Heacock, 23 Wend. 81; Hallett v. Holmes, 18 Johns. 28; Isaac v. Daniel, 8 Ad. & El. N. S. 500; Price v. Edmunds, 10 Barn. & C. 578; Lee v. Levi, 4 Barn. & C. 390; 1 Carr. & P. 553; Byles on Bills (Sharswood's ed.) [*242], 387; 2 Parsons N. & B. 242; Story on Bills, § 427; Chitty on Bills (13th Am. ed.) 468; Story on Notes, § 415.

[3] Kennard v. Knott, 2 Man. & G. 474.

[4] Fentum v. Pocock, 5 Taunt. 192.

[5] Story on Notes, § 415; Edwards on Bills, 570.

[6] Raught v. Black, 2 Disney (Ohio), 477.

[7] Bank U. S. v. Hatch, 6 Pet. 250.

[8] Hays v. Myrick, 47 Ala. 335.

§ 1321. *Fourth: The surety's assent prevents his discharge.* — *Volenti non fit injuria*, is a maxim of law, and it applies where the sureties consent to the indulgence. Then they are parties to it, and are not discharged.[1] Where the drawer replied to the holder, who stated the offer of the principal, "You may do as you like," it was held an assent to the indulgence proposed.[2] And in Thomson on Bills[3] it is said: "If an obligant be consulted as to the propriety of giving time, his silence may be taken as consent, if the delay be a reasonable one in the circumstances." It would certainly, however, be safer for the holder to require an explicit answer. An ambiguous reply should not be relied on.[4] If the holder give time to a prior party, and a subsequent party, knowing the fact, afterward promises to pay, he waives his defense, and is bound absolutely.[5]

§ 1322. *Fifth: Reservation of remedies against surety.*— The surety will not be discharged by indulgence to the principal when there is an unqualified reservation of the creditor's remedies against the surety. Thus the drawer or indorser would not be discharged by time granted to the maker or acceptor: *First*, because it rebuts the implication that the drawer or indorser was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and *secondly*, because it prevents the rights of the drawer or indorser against the accepter or maker being impaired, the injury to such right of the surety being the other reason. For the debtor (acceptor or maker) cannot complain if the instant afterward the surety (drawer or indorser) enforces these rights against him, and his con-

[1] Norris v. Crummey, 2 Rand. 334; Hunter v. Jett, 4 Rand. 107; Gloucester Bank v. Worcester, 10 Pick. 528; Smith v. Hawkins, 6 Conn. 444; Bruen v. Marquand, 17 Johns. 58; Smith v. Winter, 4 M. & W. 454; Mayhew v. Crickett, 2 Swanst. 185; Gray v. Brown, 22 Ala. 262; Story on Notes, § 419; 1 Parsons N. & B. 240; Edwards, 571; Ludwig v. Iglehart, 43 Md. 39.

[2] Clark v. Devlin, 3 Bos. & P. 363. See Prouty v. Wilson, 123 Mass. 297, for circumstances showing surety's assent.

[3] Wilson's ed. 396.

[4] Withall v. Masterman, 2 Camp. 179.

[5] Stevens v. Lynch, 12 East, 38.

sent that the creditor (the holder) shall have recourse against the surety (drawer or indorser) is impliedly a consent that such surety shall have recourse against him.[1] The contrary doctrine that such reservation of remedies is ineffectual, has been adopted in some cases.[2] Parol evidence may be given to show that an agreement which by itself would discharge a surety, was not to have that effect.[3]

§ 1323. The reservation of the rights of the surety should appear on the face of the agreement giving time, and cannot, when such agreement is written, be proved by parol. But that is not always necessary where the agreement to preserve the surety's rights is distinct and collateral.[4]

§ 1324. *Sixth:* The agreement for indulgence, in order to discharge the drawer or indorser, must be made with the maker or accepter who is the principal debtor; and if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him.[5]

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[1] Muir v. Crawford, 2 Scotch Appeals, L. R. 456 (1875); 13 Moak's Eng. R. 138. *Ex parte* Carstairs, 1 Buck, 560; Bouler v. Mayor, 19 C. B. N. S. 70 (115 E. C. L. R.); Kearsley v. Cole, 16 Mees. & W. 127 (1846), Parke, B.; *Ex parte* Glendinning, 1 Buck, 517; Boultbee v. Stubbs, 18 Ves. 20; *Ex parte* Gifford, 6 Ves. 807, 808; Owen v. Homan, 3 Eng. L. & Eq. 125; Nichols v. Norris, 3 B. & Ad. 41; Stewart v. Eden, 2 Cai. 121; Wagman v. Hoag, 14 Barb. 233, 239; Clagett v. Salmon, 5 Gill & J. 314; Morse v. Huntington, 40 Vt. 488; Viele v. Hoag, 24 Vt. 46; Hagey v. Hill, 75 Penn. St. 108; Story on Bills, § 426; Story on Notes, § 416; Thomson on Bills, 387; 1 Parsons N. & B. 241; Burge on Suretyship, 210.

[2] Gustine v. Union Bank, 10 Rob. (La.) 412 (1845); Harbert v. Dument, 3 Port. (Ind.) 246 (1852).

[3] Wyke v. Rogers, 1 DeG. Mac. & G. 408.

[4] Byles on Bills (Sharswood's ed.) [*245], 390.

[5] Frazer v. Jordan, 8 El. & Bl. 303. Coleridge, J., saying: "We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor having given no consideration for the promise, has no ground to complain of the breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in Lyon v. Holt, 5 Mees. & W. 250, 253, 254), for him to insist on such a contract can be founded. The stranger may have some private reason of his

§ 1325. An ordinary surety who has been discharged may certainly waive it, and resume liability for a consideration.[1] And perhaps without any new consideration.[2] Undoubtedly a waiver made with full knowledge of the facts, by an indorser or drawer who has been discharged, will bind him, although without a new consideration.[3]

SECTION III.

WHAT ACTS OF CREDITOR WILL NOT DISCHARGE A SURETY.

§ 1326. The surety will not be discharged either by (1) a delay of the creditor to sue the principal; (2) by receipt of part payment from the principal; or (3) by receipt from him of collateral security.

(1) *Mere delay* and passivity of the creditor does not discharge a drawer or indorser, even when the delay and subsequent insolvency of the principal deprives him of all means of reimbursement;[4] and unless authorized so to do by statute, he cannot by request or notice, compel the creditor to sue the principal debtor.[5]

§ 1327. (2) *Part payment* made to the debtor by the maker or acceptor, either before, or at, or after maturity of the note or bill, will not discharge the drawer or indorsers, except to the amount of the sum so paid, unless the part payment is accompanied with some stipulation which may be

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own to wish for some indulgence to be shown; and if he has given a good consideration, may be entitled to damages, nominal, or large or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract." Lyon v. Holt, 5 Mees. & W. 543; Sterling v. Marietta, &c. Co. 11 Serg. & R. 179; 2 Parsons N. & B. 241; Thomson on Bills, 394.

[1] N. H. Savings Bank v. Colcord, 15 N. H. 119.

[2] Fowler v. Brooks, 13 N. H. 420; 1 Parsons N. & B. 242.

[3] See *ante*, § 1222, and Chapter XXXV, vol. 2.

[4] Powell v. Waters, 17 Johns. 176; Wood v. Jefferson Co. Bank, 9 Cow. 194; Bank of S. C. v. Myers, 1 Bailey, 412; Sterling v. Marietta Co. 11 Serg. & R. 179; Freeman's Bank v. Rollins, 13 Me. 202; Worsham v. Goar, 4 Port. (Ala.) 441; English v. Darley, 2 B. & P. 61. A different rule applies as to notes not negotiable, see *ante*, § 1316.

[5] See *post*, § 1339.

hurtful to their interests. In itself it is only an extinguishment of the debt *pro tanto*, which relieves the drawer or indorsers to that extent, and is therefore beneficial.[1] It appears to have been once holden that if, on presentment for payment, the holder took less than the whole amount from the acceptor or indorser, in part satisfaction, he thereby discharged the other parties who did not assent.[2] But it is now settled that the holder may take part payment from any party, and sue the others for the residue.[3] Even an agreement that part payment shall discharge the debt, will not discharge any party to the instrument, unless some other circumstance entered into the consideration.[4]

§ 1328. (3) *The receipt of a collateral security* by the holder, from the maker or acceptor, with agreement to apply the proceeds to payment of the bill or note, will not in any wise affect the rights of the holder against the drawer or indorsers, if it be unaccompanied with any stipulation for indulgence or delay; for he is not incapacitated to pursue his remedy against any of the parties at any time, and the security taken operates for the benefit of the drawer or indorsers, who is the better protected against loss.[5] And it mat-

[1] Greenawalt v. McDowell, 65 Penn. St. 464; Hill v. Bostick, 10 Yerg. 410; James v. Badger, 1 Johns. Cas. 131; Bank U. S. v. Hatch, 6 Pet. 250; Mason v. Peters, 4 Vt. 101; English v. Darley, 2 B. & P. 61; Edwards on Bills, 570; Halliday v. Hart, 30 N. Y. 474; Turnbull v. Block, 31 Ohio St. 649.

[2] Tassel v. Lewis, 2 Ld. Raym. 744 (1695), where it is said: "If the indorsee of a bill accepts but two pence from the acceptor, he can never after resort to the drawer." Kellock v. Robinson, 2 Stra. 745 (1727).

[3] Hewitt v. Goodrich, 2 Car. & P. 468 (after dishonor); Gould v. Robson, 8 East, 576; Walwyn v. St. Quintin, 1 B. & P. 658; English v. Darley, 2 B. & P. 61; Chitty on Bills (13th Am. ed.), 472; Story on Notes, §§ 385, 422; Byles (Sharswood's ed.) [*242], 387; Thomson on Bills, 386; 2 Rob. Pr. (N. ed.) 239.

[4] See Chapter on Payment. In Hightower v. Ivy, 2 Port. (Ala.) 308, it was held, that the refusal of an indorsee who had sued the maker, to receive part payment from him discharged the indorser, it appearing that it could not be afterwards recovered.

[5] Beard v. Root, 11 N. Y. S. C. (4 Hun), 357; Bank of Utica v. Ives, 17 Wend. 502; Cary v. White, 52 N. Y. 138; Brengle v. Bushey, 40 Md. 141; Andrews v. Marrett, 58 Maine, 539; Thompson v. Gray, 63 Maine, 230; York v. Pierson, 63 Maine, 587; Lincoln v. Bassett, 23 Pick. 154; Sigourney v. Wether-

ters not that he afterward surrenders up such collateral security, on being informed that the bill would probably be paid by the drawee.[1]

§ 1329. While taking a bill, note or check as collateral security merely, without any express or implied agreement for delay in consideration thereof, does not discharge the drawer or indorsers, yet if such bill, note or check so taken by the holder be payable at a future day, there arises an implication of agreement for delay until its maturity, and, as has been said, "such indulgence may be, and is in most cases, the very consideration upon which the collateral security is given and obtained."[2] Undoubtedly the holder may show that it was agreed that there should be no delay, or that the remedy against the drawer or indorser was reserved; but that agreement for delay will be presumed, is the view sustained by weight of authority.[3] In England it was at one

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ell, 6 Met. 553; Sterling v. Marietta &c. Co. 11 Serg. & R. 179; Payne v. Commercial Bank, 6 Sm. & M. 24; U. S. v. Hodge, 6 How. U. S. 279; Wade v. Staunton, 5 How. (Miss.) 631; Ripley v. Greenleaf, 2 Vt. 129; Oxford Bank v. Lewis, 8 Pick. 458; Suckley v. Furse, 15 Johns. 338; Twopenny v. Young, 3 Barn. & C. 208; Pring v. Clarkson, 1 Barn. & C. 14; Bedford v. Deakin, 2 B. & Ald. 210; Story on Notes, § 416; Story on Bills, § 427; Edwards on Bills, 570.

[1] Hurd v. Little, 12 Mass. 502. [2] Okie v. Spencer, 2 Whart. 253 (1836).

[3] Beard v. Root, 11 N. Y. S. C. (4 Hun), 356. In this case defendant was sued as indorser of a note for $226 25. The maker received from the holder a bond and mortgage for $600, after maturity of the note, and advanced him $100 thereon. Under the circumstances of the case the court held the indorser discharged, and E. Darwin Smith, J., said: "It is doubtless true that the mere taking of collateral security for a debt without an agreement to extend the time of payment, does not discharge a surety. But it is not necessary that the agreement to extend the time of payment be in express terms. The contract in this case, unavoidably, and by clear implication, includes such an agreement." Hubbard v. Gurney, 64 N. Y. 460; Pomeroy v. Tanner, 70 N. Y. 547; Armistead v. Ward, 2 Pat. & H. 504; Bangs v. Mosher, 23 Barb. 478. In Okie v. Spencer, 2 Whart. 253, the holder of a note took from the maker, at its maturity, a check dated six days afterward, and the indorser was held to be discharged. Myers v. Willis, 5 Hill, 463; Fellows v. Prentiss, 3 Den. 512; Couch v. Waring, 9 Conn. 264; Eisner v. Kelly, 3 Daly (N. Y.), 485; Frois v. Mayfield, 33 Texas, 801. In Chitty on Bills (13th Am. ed.) [*408], 461, it is said: "It is admitted that the mere receiving a further security, payable at a future day, would in general imply an agreement to wait till it becomes due." Chitty, Jr., on Bills, 100 *w*, and 100 *x*, note; 2 Parsons N. & B. 247; 2 Am. Lead. Cas. 272; Thomson on Bills

time held that where the holder of a bill took a second bill of the acceptor, after notifying the drawer of dishonor, payable at a future day, without any express agreement, and without surrendering the first bill, the second bill should be regarded as collateral security merely, although money had been raised upon it; and that the drawer was not discharged.[1] And there is authority to the same effect in the United States.[2] But this decision is now overruled, and the English doctrine conforms to the text.[3]

§ 1330. When the bill, note, check, or other security, which is taken by the holder, is payable immediately, or what is the same thing, on demand, there can arise no presumption for delay on the part of the holder, and consequently it will not operate in itself as a discharge of the drawer or indorser.[4] Yet the holder, by neglecting to collect the amount of the bill, note or check with due diligence, may discharge the maker or acceptor who passed it to him; and thus by discharging the principal discharge the drawer or indorser. It is his duty to present a check on the same day if it be on a bank in the place where received, and to forward it by mail of the next day if in another;[5] and he must exercise diligence in presenting a bill or note payable on demand. What due diligence is, is elsewhere considered.

§ 1331. Any composition with the maker or acceptor, whereby a certain per cent. is agreed to be taken in discharge of the whole amount, upon receiving collateral security from a third person for the composition money, and it were given

(Wilson's ed.), 392, 393, note *a*; *contra*, Ripley v. Greenleaf, 2 Vt. 129, now overruled; Michigan State Bank v. Leavenworth, 28 Vt. 215.

[1] Pring v. Clarkson, 1 Barn. & C. 14; 2 Dow. & R. 78 (1822); followed in Galen v. Niemcewicz, 16 Johns. 321 (1833). This case may now be regarded as overruled. But see also Austin v. Curtis, 31 Vt. 64; Whitney v. Going, 20 N. H. 354.

[2] See preceding note.

[3] Kendrick v. Lomax, 2 Cromp. & J. 405 (1832); see Michigan State Bank v. Leavenworth, 28 Vt. 215 (1856); Baker v. Walker, 14 M. & W. 464 (1845).

[4] Crafts v. Beale, 11 C. B. 172; 2 Am. Lead. Cas. 273.

[5] Smith v. Miller, 43 N. Y. 171 (1870); 52 N. Y. 546 (1873). See Vol. II, § 1590.

accordingly, would discharge the drawer or indorser, whether he were an accommodation party or not; for it would amount to an extinguishment and satisfaction of the instrument as to all the parties thereto.[1]

This doctrine was first introduced in courts of equity,[2] but it is now universally applied by courts of law. A discharge of the maker in bankruptcy does not release an indorser.[3]

SECTION IV.

LATENT SURETIES; ACCOMMODATION, AND JOINT PARTIES AS SURETIES.

§ 1332. There is no doubt that if the party add the word "surety" to his name upon the face of the paper, it is a distinct indication of the character in which he signs, and that he will be treated as a surety as against all parties.[4] And it is equally well settled that if the party signing add the word principal to his name, or expressly describe himself as principal on the face of the paper, all parties may so regard and treat him.[5] But there are other cases in which the parties

[1] Lewis v. Jones, 4 Barn. & C. 506; Steinman v. Magnus, 11 East, 390; Story on Notes, §§ 426, 427. In Story on Bills, § 430, it is said: "Perhaps it is questionable, even if the holder has the consent of the other parties, that he may accept the composition, and hold them liable, without resorting to the compounding creditor, whether he will not still be deprived of his remedy against them, if the composition operates as a release of the debt, inasmuch as it will be a fraud upon the other creditors, if they have supposed that they had contracted with each other on equal terms. On the other hand, the holder's compounding with, or releasing, the drawer, will not discharge the acceptor of a bill, although he has accepted it for the accommodation of the drawer, unless it is expressly so stipulated."

[2] Melvill v. Glendining, 7 Taunt. 126.

[3] Pratt v. Chase, 122 Mass. 265.

[4] Hunt v. Adams, 5 Mass. 358; Robison v. Lyle, 10 Barb. 512; Edwards on Bills, 572.

[5] Sprigg v. Bank of Mount Pleasant, 10 Pet. 265, Thompson, J., saying: "In ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood that their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law, which requires of the creditor that his conduct with respect to his debtor should be such as not to enlarge the liability of the surety, and make him responsible

signing do not expressly describe in what character they are to be bound, which claim especial attention.

What we have heretofore said in respect to the discharge of those parties to bills and notes who are regarded as occupying the relation of sureties, by indulgence to or discharge of their principals, was said under the assumption that the bill or note, as the case might be, was executed upon a valuable consideration, and that all parties were bound in all respects to the holder in like manner as they appeared to be. Where the parties ostensibly principal were in reality mere parties for the accommodation of others, it has been held, by authorities of high consideration, that different and peculiar principles apply, and that in such cases, if the holder grant time to or release the party for whose accommodation another became acceptor or maker, the acceptor or maker was thereby discharged.

§ 1333. Thus it was held at *nisi prius*, by Lord Ellenborough, that where the indorsee of a bill, who received it knowing that it was accepted for accommodation of the drawer, gave time to the drawer when it became due upon his paying a part, the acceptor was thereby discharged.[1] And subsequently, by the same judge, that giving time to an accommodation acceptor would not discharge the accommodated

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beyond what he understood he had bound himself. But when one who is in reality only surety is willing to place himself in the situation of a principal by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal than the debtor would have to treat him as principal if he had set out in the obligation that he was only surety." Harris v. Brooks, 21 Pick. 195.

[1] Laxton v. Peat, 2 Camp. 185 (1809), Lord Ellenborough saying: "This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer, and in the case of simple contracts the surety is discharged by time being given, without his concurrence, to the principal. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant (the acceptor), and accepted by Hunt (the drawer), in consideration of a debt due." See Edwards on Bills, 573.

drawer, on the ground that the latter had no remedy over against the acceptor which could be materially affected;[1] in both cases regarding the acceptor as a surety, and the drawer as the principal debtor. The doctrine of Lord Ellenborough was soon doubted, and held not to apply where the acceptor promised to pay the bill when demand was made at maturity;[2] and Lord Mansfield declared in the ensuing year that "except in the case cited from Campbell (Laxton v. Peat), it never was known that anything passing between other parties could discharge an acceptor."[3] Lord Ellenborough himself, it appears, had applied a different doctrine from that held by him in the cases above referred to, in an earlier case, where a similar question was presented between the indorsee and the maker of a note for accommodation of the payee.[4] Upon the question arising in the Court of Common Pleas, in a case where it appeared that the indorsee of a bill accepted for the accommodation of the drawer took a cognovit from the drawer payable by installments, it was unanimously held that the acceptor was not discharged, and the circumstance that the holder did not know it was an accommodation acceptance when he took it, was considered by Lord Mansfield entirely immaterial.[5]

§ 1334. The doctrine of the Court of Common Pleas, enforced by the great name and cogent reasoning of Lord Mansfield, may be regarded as the settled doctrine of the courts of

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[1] Collett v. Haigh, 3 Camp. 281 (1812).

[2] Kerrison v. Cooke, 3 Camp. 362 (1813), Gibbs, J.

[3] Raggett v. Axmore, 4 Taunt. 730 (1813).

[4] Mallet v. Thompson, 5 Esp. 178 (1804). The indorsee of the payee, for whose accommodation the note was made, knowing that it was an accommodation note, covenanted in a composition deed not to sue or molest the payee on account of the debt for ninety-nine years, and received a dividend of the payee's estate. Lord Ellenborough held that the maker was not discharged, in a suit against him by the indorsee, and said: "It is true that the plaintiff, recovering on the defendant (the maker) in this case, he (the maker) may have his action over against Twigg (the payee), but it will be for money paid to his use at the defendant's suit; the payment creates a new debt, but the old debt is satisfied as between Twigg and the plaintiff."

[5] Fentum v. Pocock, 5 Taunt. 192; 1 Marsh. 14 (1813).

common law in England, in cases where the holder did not know that the note or acceptance was for accommodation at the time when he took the instrument, although he may have afterward acquired information of its true character.[1] And even where the holder knew that the apparent principal party was really signing for the accommodation of another, at the time when he received the instrument, the better opinion is that that circumstance does not alter his rights or duties, as such party has held himself out and obligated himself in a certain character, and has no just ground to demand or expect greater consideration than that legally incident to that character which he has assumed.[2] If he intended to insist on the privileges of a surety, he should have refused to bind himself save in a recognized form of suretyship. Furthermore, it may be observed, that while the indulgence or release of an acceptor (or other principal) materially affects the remedies of the drawer (or other surety) who is thereby delayed, or entirely deprived of recourse against the acceptor upon the bill itself, to which he would be entitled, and upon which he might sue the acceptor on making payment, no such injury can possibly be inflicted on the acceptor for accommodation by indulgence to or release of the drawer. The ac-

[1] Carstairs v. Rolleston, 5 Taunt. 551; 1 Marsh. 257 (1814). The holder released the payee who had indorsed to him an accommodation note. He did not know when he received it that it was accommodation paper. *Held*, the maker was not discharged.

Nichols v. Norris, 3 Barn. & Ad. 41. Parke, J., said: "I am of opinion that Fentum v. Pocock is sound law."

Price v. Edmunds, 10 Barn. & C. 578 (1830). Parke, J.: "I think that the decision in Fentum v. Pocock, where it was held that the acceptor of an accommodation bill was not discharged by giving time to the drawer, was good sense and good law."

Rolfe v. Wyatt, 5 Car. & P. 181 (1831). *Held*, giving time to drawer, on receiving part payment of bill accepted for his accommodation, did not discharge acceptor. The holder did not know it was an accommodation bill.

Harrison v. Courtauld, 3 Barn. & Ad. 37 (1832). *Held*, that holder who knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation, by releasing drawer did not discharge acceptor.

Story on Bills, §§ 253, 268.

[2] Fentum v. Pocock, 5 Taunt. 192; 1 Marsh. 14 (1813), Lord Mansfield.

ceptor may, at any time at or after maturity of the bill, pay it, and no matter what may be the arrangements between the holder and the drawer, sue the latter, not upon the bill, but for money paid to his use.[1] But now in courts of equity in England, and in courts of law where equitable pleas are admissible, the opposite doctrine prevails, and was enforced a few years since in a well considered case.[2]

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[1] See Mallet v. Thompson, *supra*, § 1333, note 4; Thomson on Bills, 237; Story on Bills, § 268.

[2] Ewin v. Lancaster, 6 Best & S. Q. B. 572 (118 E. C. L. R.) 1865. Bill accepted for drawer's accommodation, and agreement of compensation entered into between holder and drawer, the holder knowing then that the acceptance was for accommodation. Crompton, J.: "Originally the cases at law were extremely strong that the position of parties to a bill of exchange or promissory note could not be reversed by making the party who appeared on the face of the instrument to be the principal debtor surety for the other. They proceeded on the principle that parol evidence is not allowed to alter a written contract. That principle is a sound one, and has governed many cases in courts of law. But cases in equity establish, that when one or both of two parties to an instrument are primarily liable, as in the instance of a common bond where several join as obligors, and the creditor may sue any one of them at any time, it is competent for him to show that the relation of principal and surety exists between the parties. Lord Cottenham, in Hollier v. Eyre, 9 Cl. & F. 1, 45, referred to in Pooley v. Harradine, 7 E. & B. 431, 435 (90 E. C. L. R.), explained that the doctrine on which the courts of equity proceed arose from its being inequitable that the creditor should prejudice the rights of the surety against the principal. In Strong v. Foster, 17 C. B. 201 (84 E. C. L. R.), which was after pleas on equitable grounds had been introduced, the evidence failed to support the equitable defense, and it was not necessary to pronounce an opinion on the validity of it. In Pooley v. Harradine, 7 E. & B. 431 (90 E. C. L. R.), this court upheld a plea on equitable grounds, which stated that the defendant made the note jointly, with A. as surety only for him, of which the plaintiff had notice at the time, and that the plaintiff gave time to A. without the defendant's knowledge. That decision was adopted by the Court of Exchequer in Taylor v. Burgess, 5 H. & N. 1, and was held to be law by the Exchequer Chamber, in Greenough v. McClelland, 2 E. & E. 424, 429 (105 E. C. L. R.). But Pooley v. Harradine left one matter in doubt, viz., whether the creditor must have had notice of the suretyship at the time of taking the notes, or whether notice at the time of the dealing, alleged to amount to a discharge of the surety, was sufficient. That case came before this court in Bailey v. Edwards, 4 B. & S. 761 (116 E. C. L. R.), which is very analogous to the present; and the law accurately laid down by my brother Blackburn, in that case, applies here. There the plaintiffs, when they executed the deed by which time was given, had notice that the bill was accepted for the accommodation of their debtor; and that is the time to be looked at, because it is the time when the equity arises. It is clear that a creditor is not bound to sue

§ 1335. In the United States the rule is generally sustained that the parties to a bill or note are bound by the character which they assume upon its face, and that they are liable to, and may be treated by the holder according to their ostensible relations to the instrument, especially when he had no knowledge that any of them were accommodation parties at the time when he became a holder for value.[1] And the observation of Story may be quoted with approval, that "the strong tendency of the more recent authorities is to hold that, in all cases, the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent, and in the same manner, whether he knows or not the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves."[2] There is strong authority also for what seems to us the better doctrine, that even if the holder knew at the time he received the bill or note that it was accepted or made for accommodation, his rights and duties are in no respect altered; and no indulgence to or release of a drawer or indorser will discharge the acceptor or maker.[3] But if the holder knew the acceptance was for a

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either the principal or the surety. No delay in suing the surety will prejudice him, but he must not make a binding agreement by which he ties up his hands from suing the principal. If he does so, the surety is discharged, on the principle explained by Williams, J., in Strong v. Foster, 17 C. B. 201, 219 (84 E. C. L. R.). Here the plaintiff made a contract with the principal, upon good consideration, to give up the bills to be canceled. Whether that is a waiver of the right of action against the surety may be doubtful; for a waiver can only be to the party himself who relies upon it. But by that contract the plaintiff, for a good consideration, tied up his hands from suing the principal debtor. It may be shown by parol evidence, that in the transaction between the creditor and his debtors, according to truth and for the purposes of equity, one of the debtors was surety for the other; and then the creditor is within the rule by which, if he gives time to the principal debtor, the surety is discharged."

[1] Farmers' &c. Bank v. Rathbone, 26 Vt. 19; Gano v. Heath, 36 Mich. 441; Summerhill v. Tapp, 52 Ala. 227.

[2] Story on Promissory Notes, § 418; see Story on Bills, § 253; *contra*, see Edwards on Bills, 573.

[3] Bank of Montgomery v. Walker, 9 S. & R. 229; s. c. 12 S. & R. 382. The

particular purpose, which had been accomplished when he took the bill, he could not recover.[1]

§ 1336. *Whether or not it may be shown by parol that a joint promissor was in fact a surety, and known to be such by the holder*, there is no doubt that where the relation of suretyship exists between joint promisors upon a bill or note, their true relation may be shown as between themselves;[2] but upon the question whether or not it may be shown in an action against them by the payee, the English and American cases exhibit great contrariety and vacillation of opinion. In Byles on Bills,[3] it is stated as the result of the English authorities that: "When of a joint and several note one

case of Fentum v. Pocock was approved. White v. Hopkins, 3 W. & S. 101; Lewis v. Hanchman, 2 Barr, 416: Murray v. Judah, 6 Cow. 484; holder knowing acceptor of check was for accommodation, gave time to drawer; held acceptor not discharged. Clopper's Adm'r v. Union Bank, 7 Har. & J. 92; Yates v. Donaldson, 5 Md. 389; Lambert v. Sandford, 2 Blackf. 137; Hansborough v. Gray, 3 Grat. 356; Claremont Bank v. Wood, 10 Vt. 182; 2 Robinson's Practice (N. ed.) 241; Stiles v. Eastman, 1 Kelly, 205; Cronise v. Kellogg, 20 Ill. 13 (1858), Caton, J.: "The wider the door is opened to admit defenses to bills of exchange, the more is their general value impaired, and the more are commerce and exchange embarrassed. The acceptor of a bill of exchange has always been considered the party primarily liable to pay it. He expressly agrees to pay it, whether he has funds of the drawer in his hands or not, even though he expects to be in funds from the drawer. An accommodation acceptor occupies precisely the same position as one who accepts with funds, as to all persons who receive the bill for value, whether they know that it was an accommodation acceptance or not. And it is a general maxim, that an acceptor of a bill of exchange can never be discharged, except by payment or a release." But see Parks v. Ingram, 2 Post. 283; Adle v. Metroger, 1 La. Ann. 254. See on this subject, Story on Bills, §§ 425, 432 and 435, where it is said: "There seems a strong inclination in the more recent authorities to the doctrine, that the rights of all the parties to the note are, in respect to the holder and his acts, governed by precisely the same rule, whether the note be one for the accommodation of all the parties or not." Also § 253.

In 2 American Lead. Cas. 435, it is well said: "He who makes a note or accepts a bill for the accommodation of another, virtually authorizes those who take the instrument subsequently to make such terms or arrangements with the drawer or indorsers, as may be most conducive to their mutual interests, and cannot revoke the authority thus given, to the injury of others who have acted upon it."

[1] Fletcher v. Heath, 7 B. & C. 517; Cartwright v. Williams, 2 Stark. 340.

[2] M'Gee v. Prouty, 9 Metc. 547; Harris v. Brooks, 21 Pick. 195.

[3] Byles (Sharswood's ed.) [*238], 381.

maker is in reality principal and the other surety, yet it is no defense at law that one is principal and the other is surety, that this was known to the creditor at the time of the contract, and consequently that the surety is discharged by time given to the principal.[1] But such a defense is plainly available in equity,[2] and therefore may be the ground of an equitable plea," the equitable plea being allowed in England by the statute of 17 and 18 Victoria, c. 125.

§ 1337. In the Court of Queen's Bench, one maker of a note, who was known to the payee to be only an accommodation maker or surety for the others, was held to be discharged by the payee's contracting to give time, and giving it, to the other makers, although on the face of the note he was a joint principal; the decision being rendered upon an equitable plea allowed by the English statute, and based upon the ground that extraneous evidence to show that the defendant was surety for the other joint promissors did not and could not vary his contract; but that when it was established that he was a surety, and that the plaintiff knew it when he took the note, an equity was created which entitled him to insist on such a course of conduct by the plaintiff as would work him no injury.[3] More recent decisions have

[1] Price v. Edmunds, 10 B. & C. 578; Perfect v. Murgrave, 6 Price, 111; Manley v. Boycot, 2 El. & B. 46; Rees v. Berrington, 2 Ves. Jr. 540.

[2] Hollier v. Eyre, 9 C. & F. 45; Davies v. Stainbank, 6 DeG. M. & G. 679; Pooley v. Harradine, 7 El. & B. 431; Greenough v. McClelland, 30 L. J. Q. B. 15.

[3] Pooley v. Harradine, 7 El. & Bl. 431; 40 Eng. L. & Eq 96. In Manley v. Boycot, 2 El. & Bl. 46 (1853), an action by the payee of a joint and several note against one of the makers, the defendant pleaded that he was in reality a surety, and the court held the plea bad because it did not allege that the note was delivered by the defendant to the plaintiffs as surety, and that they agreed so to receive it from him, Lord Campbell, C. J., saying: "No parol evidence can be received of any agreement inconsistent with what appears on the face of the instrument, as that a bill drawn payable at three months shall not be payable till the expiration of four months; but evidence may be given by parol of an agreement at the time a bill is drawn and indorsed which is consistent with the written instrument; as, for example, that a bill is indorsed and handed over for a particular purpose, without giving the bailee the usual rights of indorsee of the bill. But if the payee of a joint and several promissory note, made in the common form by two, may be placed in the situation of treating the one as surety for the other, this can only be done by his express assent to do so when the note was delivered to him."

gone a step further, and held that if the creditor knew the relation of suretyship when he granted the indulgence, the surety would be discharged.[1] This may be regarded as the law of England on the subject; but the cases which have held that the holder has a right to treat all the parties to a bill or note as continually bound in the character which they have assumed upon the instrument, and that by assuming such character they consent and contract that they may be so treated (unless the holder agreed to regard them as sureties), seem to us to embody the true principles which should be respected and followed.[2]

§ 1338. In the United States, we think the weight of authority is in favor of allowing evidence to show that one of the joint promisors signed as surety, and that this was known to the payee or indorsee when he took the instrument.[3] And there are cases which hold that if he knew the fact that one of the promisors was surety at the time when he granted indulgence to the other, it will be equally as

[1] Bailey v. Edwards, 4 Best & S. Q. B. 761 (1864) (116 E. C. L. R.); Ewin v. Lancaster, 6 Best & S. Q. B. 572 (1865) (118 E. C. L. R.); see *ante*, p. 315, note 2. In Swire v. Redman, 1 Q. B. Div. 536 (1876), Cockburn, C. J., speaking of the doctrine that any act which impairs the rights of the surety discharges him, says: "As it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning, such was not acquired till after the surety had become liable to the creditor."

[2] In Strong v. Foster, 17 Com. B. (8 J. Scott), 204 (84 E. C. L. R.) 1855, Willes, J., said: "You cannot show, by parol evidence, that the contract of a party to the bill or note was intended at the time it was made, to be other than that which is apparent on the face of the instrument itself. * * A person who signs a note as a principal debtor must, in proceedings upon the note, undergo all the liabilities of a principal debtor, although as between himself and the party at whose instance he signs it, he is in fact a surety only, and that fact was known to the creditor at the time the note was handed over." And after commenting on the cases, he adds: "The result seems to be that here, if evidence is admissible to show that the defendant signed the note as surety, it must also be shown that the bankers agreed to accept him as such; and consequently that in the present case, where there was no such evidence, the defendant is not entitled to be treated as a surety, and the defense does not arise."

[3] Rose v. Williams, 5 Kans. 489 (1870); Perry v. Hadnett, 38 Ga. 104; 1 Parsons N. & B. 233, 234, note *e*.

effectual as a discharge of the surety promisor.[1] But the authorities are by no means harmonious; and in the midst of conflicting opinions we strongly incline to concur with those which look only to the face of the instrument to ascertain the rights and liabilities of all the parties. If a party intends to insist on a surety's rights, he should sign the instrument in a form which will carry notice of the fact to those dealing with it. And if the holder treats him in a manner consistent with his ostensible relation to the paper, it tends to disappoint his reasonable and just expectations to permit such party to set up defenses based upon extraneous circumstances.[2] It will be seen that some of the cases, both in England and America, take the view that it may be shown that the payee agreed to regard the copromisor as surety, and

[1] Wheat v. Kendall, 6 N. H. 504, Parker, J., saying: "The injury to the surety is the same as if the creditor had possessed the knowledge at the time the note was taken." Branch Bank v. James, 9 Ala. 949; but the party might show that the defendant undertook to deal as principal and not as surety.

In 1 Parsons N. & B. 233, it is said: "On the question whether parol evidence is admissible to show that one who signed a note as a joint or joint and several maker was only a surety for his co-maker, in an action by the holder against such surety, the authorities are conflicting and uncertain. It seems to be settled that where the fact was not known to the holder previous to the maturity of the note, such evidence is inadmissible; but where this relation was known to the holder at the time of entering into the contract, the evidence is admissible in equity. But, at law, it is urged, on the one hand, that this is an attempt to vary the contract; that the parties, having called themselves joint or joint and several promisors in the contract, cannot assume a different relation or character by extraneous evidence. On the other hand, it is contended that the note does not express the whole contract, since it depends materially upon delivery, and the purposes for which delivery is made; that the terms of the note only offer a presumption of the relation in which the parties stand to each other; that this is a mere collateral fact which can be proved, and the presumption rebutted by parol evidence. We consider the weight of authority and principle is in favor of the admission of such evidence."

[2] Benjamin v. Arnold, 9 N. Y. S. C. (2 Hun), 447 (1874). In this case, payee of a joint and several note sued the four signers. Three of the defendants offered to prove that they signed as sureties only for the accommodation of the fourth, which fact was known to the plaintiff at the time she took the note, and that after its maturity, she, without their consent, extended the time of payment. *Held*, that the evidence was inadmissible. To same effect see Campbell v. Tate, 7 Lans. 370. But these cases in New York, are now overruled in Hubbard v. Gurney, 64 N. Y. 460.

that nothing short of such an agreement will justify his claiming a surety's privileges in any respect. This intermediate ground has much to commend it; and if any departure is made from the face of the instrument, it seems to be far more equitable and just than those which make mere knowledge of the suretyship the criterion.[1]

SECTION V.

SURETY'S REMEDIES.

§ 1339. We have already seen that mere passivity of a creditor does not discharge the surety. Even when the delay of the creditor and the subsequent insolvency of the principal deprive the surety of all means of reimbursement, he must still submit to it;[2] for the duty of performance rests upon those who make contracts. And, in the absence of statutory provision, the surety cannot by notice or request compel the creditor to commence a suit against his principal debtor.[3] The surety has his own efficient and appropriate remedies: (1) He may pay the debt and institute an action for money paid to his use, against the principal, and recover

[1] See cases *supra*.

[2] Alcock v. Hill, 4 Leigh, 622; U. S. v. Simpson, 2 Penn. 427; Carr v. Howard, 8 Blackf. 199; Adams Bank v. Anthony, 18 Pick. 238.

[3] Croughton v. Duvall, 3 Call, 73; Humphrey v. Hitt, 6 Grat. 509; 5 Rob. Prac. (N. ed.) 781; 1 Parsons N. & B. 237; 2 Id. 243, note. In Pain v. Packard, 13 Johns. 174, it was held that neglect to sue the solvent principal by the holder, at the request of the surety, and the subsequent insolvency and absconding of the principal, discharged the surety. This doctrine was denied by Chancellor Kent, in King v. Baldwin, 2 Johns. Ch. 554; but was reaffirmed by the Court of Errors, in the same case, reported in 17 Johns. 384. The courts of New York follow this latter decision, but within strict limits. The opinion of Chancellor Kent is now admitted to be the sounder view (see 2 Am. Lead. Cas. 339); and in Herrick v. Borst, 4 Hill, 450, Cowen, J., said of the doctrine of Pain v. Packard, that it "came into this court without precedent, was afterward repudiated even by the Court of Chancery, as it has always been held at law and in equity in England, but was restored on a tie by the casting vote of a layman." But even in New York (as we have already seen in Section I, *ante*), the indorser, while regarded in the nature of a surety, is not a surety in the sense of the cases above quoted, who has a right to require the creditor to sue the maker. Beardsley v. Warner, 6 Wend. 613; Trimble v. Thorn, 16 Johns. 152.

it back.[1] In some States, as in Virginia, he may recover it back by motion. Or (2) he may file a bill in chancery against the principal to compel him to make payment to the creditor.[2] Or (3) the surety may file a bill in chancery to compel the creditor to bring his action against the principal, upon being indemnified against the consequences of risk, delay, and expense.[3] And (4) if he pays the debt, and then be a cosurety, he may file a bill against him for contribution.

§ 1340. *As to contribution.*—An indorser is a surety to the holder for all parties liable prior to him, and each one of them (except acceptor) is a surety to him. But indorsers are not cosureties (unless their indorsement is joint), but are severally and successively liable.[4] Where the sureties are not as between themselves principal and surety (as are prior and subsequent indorsers), but are merely cosureties, as are two or more joint, or joint and several makers of a note, if one be required to pay the whole debt, the others are bound to contribute in equal proportions, and the cosurety may recover of the others their aliquot shares.[5] And this right of contribution arises though the same debt be secured by different instruments, executed by different sureties; and though one portion of the debt be secured by one instrument, and one portion by another;[6] and even though the surety demanding contribution did not at the time of the contract know that he had any cosureties.[7]

§ 1341. The cosurety, in order to sustain his suit for contribution, must have made payment under a legal and fixed obligation,[8] but not necessarily under compulsion of suit or

[1] Humphrey v. Hitt, 6 Grat. 524; Story on Notes, § 419.

[2] Humphrey v. Hitt, 6 Grat. 524.

[3] Humphrey v. Hitt, 6 Grat. 521; King v. Baldwin, 17 Johns. 324.

[4] See *ante*, § 703, vol. 1; M'Neilly v. Patchin, 23 Mo. 40.

[5] Byles on Bills (Sharswood's ed.) [*217], 392; 2 Parsons N. & B. 253; Davis v. Emerson, 17 Me. 64; Fletcher v. Jackson, 23 Vt. 581; Pitt v. Purssord, 8 M. & W. 538.

[6] Deering v. Earl of Winchelsea, 2 Bos. & P. 270; Mayhew v. Crickett, 2 Swanst. 184.

[7] Craythorn v. Swinburne, 14 Ves. 169.

[8] Pitt v. Purssord, 8 M. & W. 538; Davies v. Humphreys, 6 Id. 153.

legal process.[1] The right to contribution arises out of an implied promise amongst cosureties to share equally the burdens of cosuretyship,[2] and therefore does not exist where there is an express understanding to the contrary.

The right of a cosurety to contribution is not prejudiced by his possessing a security against the principal, which the defendant neither has nor knows anything about.[3]

§ 1342. A surety who pays a bill or note, or other obligation of his principal, is entitled to indemnity from him, and may recover back the amount with legal interest thereon.[4] But the limit of the surety's recovery is simply the amount necessary to indemnify him, and therefore, even though he take an assignment of the creditor's claim, he cannot recover the amount that the creditor was entitled to receive, but only the amount which he paid.[5] If he compromises the debt, he can only recover back the amount accepted by the creditor in compromise of it;[6] and if he pays in a depreciated currency, he cannot recover a dollar in legal tender for every dollar of such currency, but only the value of the currency paid.[7]

It has, however, been held in Massachusetts, that where an accommodation indorser, who is the payee of a note which had been negotiated by the maker for the full amount, took it up, paying only half of the sum, he could sue the maker as payee, and recover the full amount thereof.[8] In Virginia, the accommodation indorser who makes payment has (and, as we think, justly) been held to stand on no higher footing

[1] 2 Parsons N. & B. 253.

[2] Kemp v. Finden, 12 M. & W. 521.

[3] Done v. Walley, 2 Exch. 198.

[4] Blow v. Maynard, 2 Leigh, 54; Kendrick v. Forney, 22 Grat. 750; Pace v. Robertson, 65 N. C. 550; Barnett v. Cecil, 21 Grat. 95; Burton v. Slaughter, 26 Grat. 920.

[5] Blow v. Maynard, 2 Leigh, 54.

[6] Blow v. Maynard, 2 Leigh, 54; Kendrick v. Forney, 22 Grat. 753; *Ex parte* Rushforth, 10 Ves. 409, 420; Butcher v. Churchill, 14 Ves. 567; Read v. Norris, 14 Cond. E. C. R. 362, 375.

[7] Kendrick v. Forney, 22 Grat. 748; Pace v. Robertson, 65 N. C. 550.

[8] Fowler v. Strickland, 107 Mass. 552; *contra*, Pace v. Robertson, 65 N. C. 550.

than any other surety, and there he can only recover the amount paid by him.[1]

§ 1343. The surety making payment is entitled to all the securities which his principal was entitled to for the payment of the debt, being substituted into his place when he pays the debt for him;[2] and where the maker of a note executes a mortgage to secure an indorsee, the payee of the note, on making payment, becomes entitled to the benefit of the mortgage.[3]

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[1] Burton v. Slaughter, 26 Grat. 920; Barnett v. Cecil, 21 Grat. 95.

[2] See *ante*, § 1312.

[3] O'Hara v. Haas, 46 Miss. 374.

CHAPTER XLII.

THE FORGERY OF NEGOTIABLE INSTRUMENTS.

SECTION I.

THE DEFINITION AND NATURE OF FORGERY.

§ 1344. *Forgery is the counterfeit making or altering of any writing with intent to defraud.*[1]—The most usual species of forgery is fraudulently writing the name of an existing person; but where one is in possession of a paper containing a genuine signature, and fraudulently fills it up so as to make it appear to be signed as maker,[2] or indorser,[3] or other party to a bill or note,[4] it is as much a forgery as if the signature itself had been forged. So where one has authority to fill up a bill or note in blank, with a particular sum, and he fraudently inserts a larger sum, it is as much a forgery as if he had acted without any authority at all.[5]

§ 1345. Passing a note signed by one person in his own name, as the note of another person of the same name, if done with intent to defraud, is a forgery;[6] and so appending to one's own name, a false addition of description, as by residence or occupation, of another person of the same name;[7] or indorsing a note by another person of the same name with the real payee, or special indorser.[8] So, one, who with intent fraudulently to utter a promissory note as a note of a person

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[1] Byles on Bills (Sharswood's ed.) [*317], 483.

[2] Rex v. Hales, 17 St. Trials, 161. [3] Ibid.

[4] Powell v. Commonwealth, 11 Grat. 822.

[5] Regina v. Wilson, 17 L. J. M. C. 82; Rex v. Hart, 7 C. & P. 652.

[6] Rex v. Parkes, 2 Leach Cr. L. 614.

[7] Rex v. Webb, Russ. & R. C. C. 72; Rex v. Parke, 2 Leach, 775; Rex v. Rogers, 8 Car. & P. 629.

[8] Mead v. Young, 4 T. R. 28.

other than the signer, procures to it the signature of an innocent party who does not thereby with intent to bind himself, is guilty of forgery.[1] But where a person falsely represents himself to be the indorser of a bill, but writes nothing falsely himself, if there be a real person who did indorse the bill in his own proper name, the offense will not be forgery, but obtaining goods or money upon false pretences.[2] And so as to any other genuine signature, though it be passed for another, yet if there be nothing upon the bill or note to apply it to that person, it is not a forgery.[3]

Where a party habitually uses an assumed name, the signing of it is not a forgery; but if a party assumes a name for the purpose of fraud, a bill or note under the assumed signature will be a forgery.

The signature of a fictitious name or firm, if made with intent to defraud, constitutes forgery.[4] Thus uttering a forged order for the payment of money, signed "Rt. Venest," there being no such person in existence, is a forgery.[5] So indorsing a bill in the fictitious name of "John Williams."[6]

§ 1346. *A mere informality in the language* of a bill or note, such as the omission of a word, or a misspelling, or other grammatical error, as where "pounds" was omitted;[7] or "pound" was used for "pounds;"[8] or "I promised" for "I promise,"[9] does not impair its validity; and, therefore, the making or altering of such an instrument is a forgery. But if a paper were made or altered in such a way as to be upon its face void, or fatally defective in law, it would seem to be otherwise.[10] Thus a bill drawn payable to "———

[1] Commonwealth v. Foster, 114 Mass. 311.

[2] Hevey's Case, 1 Leach, 229; Chitty on Bills [*780].

[3] Chitty on Bills [*780].

[4] Chitty on Bills [*782]; Commonwealth v. Chandler, Thatcher Crim. Cas. 187; State v. Givens, 5 Ala. 747.

[5] Lockett's Case, 1 Leach, 94.

[6] Taft's Case, 1 Leach, 172.

[7] Chisholm's Case, Russ. & R. 297.

[8] Rex v. Post, Russ. & R. 101.

[9] Perkins v. Commonwealth, 6 Grat. 651.

[10] See Clarke v. State, 8 Ohio St. 630; State v. Humphreys, 10 Humph. 442; Rex v. Burke, Russ. & R. 496; Wall's Case, 2 East P. C. 953 (a will); Chitty on Bills [*774].

or order," and signed with a forged signature, is not a forgery, because without a payee, and therefore a mere nullity.[1] But if payable to bearer it would be different.[2] A note without a signature is the same as a mere blank, and cannot be deemed a forgery.[3] But the total absence of any stamp, or defect in the proper stamp, will not prevent the instrument from being a forgery.[4]

§ 1347. The alteration of a completed instrument, by a material change in its terms, with intent to defraud, is as plain a forgery as the making of it altogether; for it fraudulently assumes to bind the parties to a contract to which their consent is wanting.[5] Thus, where a clerk broke the seal of a letter, and altered a check which it contained to a larger amount, it was deemed a forgery;[6] and so any fraudulent material change in the terms of the paper, whether in amount,[7] place of payment,[8] time of payment.[9]

§ 1348. The making of the bill or note must be counterfeit and false in order to amount to a forgery, and if real, though fraudulently procured, it will be a fraud, but not a forgery. Thus, where a person writes a note for a certain sum, and procures another to sign it as maker, under the false representation that it is for a smaller sum, it is not a forgery.[10]

§ 1349. The intent to defraud is essential to constitute forgery; and although a bill or note will not be binding upon those whom it purports to bind if their names have been signed to it, or it has been altered without authority,

[1] Rex v. Richards, Russ & R. C. C. 193.

[2] People v. Brigham, 2 Mich. 550.

[3] Rex v. Pateman, Russ & R. C. C. 496; Regina v. Keith, 29 Eng. L. & Eq. 558.

[4] Rex v. Reculist, 2 Leach, 703; Rex v. Hall, 3 Stark. 67; Chitty on Bills [*779].

[5] Wheelock v. Freeman, 13 Pick. 165.

[6] Belknap v. National Bank, 100 Mass. 379.

[7] Rex v. Post, Russ. & Ry. 101.

[8] Rex v. Treble, 2 Taunt. 328.

[9] Rex v. Atkinson, 7 Car. & P. 669.

[10] Commonwealth v. Sankey, 22 Penn. St. 390; People v. Getchell, 6 Mich. 496; Regina v. Coulsen, 1 Eng. L. & Eq. 550; 1 Parsons N. & B. 586, note *x*.

the party who has ignorantly or innocently executed or altered it under a supposed authority, will not be deemed guilty of a forgery.[1] Nor will the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument where no person can be injured thereby, amount to forgery.[2]

§ 1350. The delivery of a bill or note, or other written contract, is necessary to its validity; and so the "uttering," which is the term used to describe the delivery by a forger or counterfeiter to some person of the forged instrument, is necessary in order to complete the crime of forgery. Giving the bill or note to a confederate to utter is an uttering thereof.[3] But merely displaying forged instruments with fraudulent intent, or handing them over to another without designing to pass them off, is not.[4] If the note be payable to the forger's order, his transfer of it without indorsement is an uttering thereof.[5] When forgery of a signature is alleged, it will not be competent to prove that the party charged to be guilty has committed a forgery of a similar character, and absconded on that account.[6]

SECTION II.

LIABILITY OF PARTY WHO ADOPTS A FORGED SIGNATURE AS HIS OWN.

§ 1351. Where a person's signature is forged as drawer, maker, acceptor, or indorser, it is, as a general rule, a mere nullity as to him. And ordinarily such person may deny the genuineness of his signature, or show that although the signature be genuine, the writing attached to it has been materially altered; in which cases he would not be bound. But if he pronounces his signature genuine, or the instrument

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[1] Roscoe's Crim. Evidence, 505.

[2] Chitty on Bills (13th Am. ed.) [*785].

[3] Rex v. Palmer, Russ. & R. C. C. 72. [4] Rex v. Shukard, Russ & R. 200.

[5] Rex v. Beckett, Russ. & R. 86; Rex v. Post, Russ. & R. 101.

[6] Balcetti v. Serani, Peake, 142.

valid, to a person who buys on his assurances, he could not afterward set up such a defence against him, or any one claiming under him.[1] He will be estopped to deny his own concessions; for to hold otherwise would inflict the penalty of his folly or fraud upon an innocent person. It has also been held that a party may be bound by adoption of a forged instrument, where he states or concedes it to be genuine to the holder. Thus, where one whose name appeared as a joint maker told the indorsee, after the delivery to him by the indorser, that he would pay it, it was held a ratification of the signature as his own, and that he could not afterward show that it was a forgery.[2]

§ 1352. There can be no doubt as to the party's liability by an admission of the genuineness of his signature in any case where another party has been induced to act on his representation, and would suffer loss if he were afterward to repudiate it;[3]—as, for instance, when he tells the holder to "hold on," and that "he will pay him," thereby inducing delay, during which other parties abscond and become insolvent.[4] But where a person, through mistake, states that his signature is genuine, and afterward discovering his error, speedily corrects it before the holder has changed his relations to the paper, or any one has dealt with it upon the faith of his admission, we know of no principle of law which prevents the forgery from being pleaded.[5] No innocent person can suffer, and simple justice is done the person whose name is forged by allowing him, under such circumstances, to

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[1] Woodruff v. Munroe, 33 Md. 158; Casco Bank v. Keene, 53 Me. 104; Beeman v. Duck, 11 M. & W. 251; Leach v. Buchanan, 4 Esp. 226; Greenfield Bank v. Crafts, 4 Allen, 447; Dow v. Sperry, 29 Mo. 390.

[2] Howard v. Duncan, 3 Lans. 174 (1870). Mullen, P. J.: "I cannot perceive any reason why a person whose name has been forged may not adopt and affirm the signature as his own act, and thereby subject himself to whatever civil liability may follow from it."

[3] See *ante*, Chapter XXIV, Section VII, Vol. 1.

[4] Hefner v. Dawson, 63 Ill. 403.

[5] Woodruff v. Munroe, 33 Md. 158; Brook v. Hook, L. T. R. 24 Exch. 34; 5 Am. Rep. 447, note; Morse on Banking, 310.

prove the truth of the case. But as a mere matter of testimony, a prior admission of the genuineness of a signature would weigh heavily; and a subsequent denial, as it seems to us, should be supported by very satisfactory explanations in order to overcome it. And if the party knew his signature was forged, and declared it was his, it might be urged that this was an adoption of it;[1] and this view has been forcibly set forth in Illinois, where a surety deliberately declared the signature his own, and afterward pleaded forgery.[2] Also in Massachusetts, it being there held that if he acknowledges it as his signature, with intent to be bound, he is as much bound as if he had originally authorized it; and even if his acts did not amount to an *estoppel in pais*.[3] This view seems to us correct; although, it has been held that evidence that one whose name was signed to a note without authority, afterward recognized it, and promised to pay it, was not alone sufficient to charge him, it being considered that he was not bound unless he knew all the facts affecting his rights.[4] When there has been actual fraud, and the adverse party has acted *mala fide*, there can be no such thing as a legal confirmation or adoption, without a new consideration, according to the best authorities.[5]

§ 1353. So a party may, by his acts and course of conduct, be bound, although his signature be forged. Thus, if it be shown against an acceptor who proves his signature a forgery, that he has customarily paid similar drafts of the party forging, knowing the forgery, he will be held liable upon the bill, as having adopted such acceptances.[6] But the mere fact that the acceptor has paid such forged drafts is not an absolute estoppel.[7] If the acceptor, upon presentment of

[1] See Dow v. Sperry, 29 Mo. 387; Union Bank v. Middlebrook, 33 Conn. 100.

[2] Wellington v. Jackson, 121 Mass. 157.

[3] Hefner v. Vandolah, 62 Ill. 483.

[4] Gleason v. Henry, 71 Ill. 109.

[5] Chamberlain v. McClurg, 8 Watts & S. 36; McHugh v. County of Schuylkill, 67 Penn. St. 391.

[6] Barber v. Gingell, 3 Esp. 60; Cront v. DeWolf, 1 R. I. 393.

[7] Morris v. Bethell. See note 2, p. 331.

the bill, gives the holder another bill in payment, he cannot show in a suit on the second bill, that the first was a forgery, for he is bound to know his own signature.[1] But a party would not be bound upon a bill, by a forged acceptance in his name, by the mere fact that he had previously paid another bill similarly accepted, if he had not led the holder to believe that the second bill was genuine.[2]

SECTION III.

WHEN ONE PARTY IS ESTOPPED FROM DENYING THE GENUINENESS OF ANOTHER'S SIGNATURE.

§ 1354. The relation of one party to a bill or note is often such that he cannot deny the genuineness of another's signature—for having treated it himself as genuine, it would be a fraud to permit him to assert the contrary. *And first, in respect to the maker of a note*, this doctrine is not often applicable to him. If he makes and delivers the note to the payee, and there is no signature upon it but his own, it is obvious that should it come into the hands of a *bona fide* holder thereafter, bearing at the time the forged indorsement of the payee to whose order it was made payable, the maker could not be regarded as responsible for the forgery, or as warranting the genuineness of the signature, and no recovery could be had against him by such holder, as he would be unable to trace his legal title to the instrument.[3] Nor, indeed, would the maker be at all justified in making payment to him, as the payee, not having indorsed the note, still holds the legal title, and could require payment to be made again

[1] Mather v. Lord Maidstone, 18 C. B. N. S. 273 (1856); 37 E. L. & Eq. 335.

[2] Morris v. Bethell, Law R. 5 Com. P. 47 (1869), Bovill, C. J., saying: "If it had been made to appear that there had been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of the principal, there would be evidence, and almost conclusive evidence, against the latter, that the acceptance was written by his authority. That was the case of Barber v. Gingell. It would have been idle to contend there that the defendant was not responsible for the signature."

[3] Story on Notes, §§ 379, 380, 387.

to him, if without his indorsement it were paid to another.[1] But if the forged name of the payee were indorsed upon the note, or the name of the payee were fictitious and were indorsed upon the note, at the time when it was delivered by the maker, the case would be different. Having issued the note as genuine in all respects, it would be unjust and fraudulent upon others to permit him to deny it; and proof of his having so issued it would be sufficient to entitle the holder to recover against him.[2]

§ 1355. Under such circumstances—that is, where the forged indorsements were on the note when he issued it—the maker could not, of course, recover back the amount paid to the holder; for, in addition to the reasons already given, such payment could not be regarded as having been made under a mistake. Under other circumstances, however, the maker may recover back the amount from the party to whom he paid it,[3] for the holder, by the very act of assuming ownership and demanding its payment, impliedly asserts, even though it be without his indorsement, that he has clear title and is entitled to receive payment.[4]

§ 1356. *Secondly, in respect to the drawer of a bill*, his relation to other parties is ordinarily like that of the maker of a note. If he issues the bill, as is generally the case, without any other name upon it but his own, he cannot be made responsible for the subsequent forgery of an indorsement or acceptance; and if the name of the payee to whose order the bill is payable, or of a special indorsee, be forged, no recovery can be had against him.[5] But if the drawer puts the bill in circulation with the name of the payee indorsed upon it, he will be understood, by so doing, as affirming that the indorsement is in the handwriting of the

[1] 2 Parsons N. & B. 596; Story on Notes, §§ 379, 380, 387.

[2] Meacher v. Fort, 3 Hill (S. C.), 227 (1837); Hortsman v. Henshaw, 11 How. 177 (1850); see also Beeman v. Duck, 11 M. & W. 251; Redfield & Bigelow's Lead. Cas. 62.

[3] See *post*, § 1359, as to Acceptor; Story on Notes, §§ 379, 380, 387.

[4] See § 1361, *infra*.

[5] See § 735, vol. 1; and *post*, § 1361.

payee, or written by his authority; and if it be forged, the amount paid under such indorsement may be credited against him by the acceptor, or recovered against him by the holder of the bill.[1]

§ 1357. *Thirdly, in respect to the indorser of a negotiable instrument*, upon which the name of the drawer, maker, acceptor, or of a prior indorser is forged, he, by indorsing it, warrants that he has clear legal title thereto, and that the instrument is the genuine article it purports to be, and he is, therefore, bound by his indorsement to all parties subsequent to him,[2] even though the paper has been discounted for a prior party.[3] He is like the drawer of a bill who issues it with such names upon it. But if all the names of parties antecedent to his own are genuine, he is then like the drawer of a bill who issues it without any names upon it; and if he pays it to any one holding under a forged indorsement subsequent to his own, he may recover back the amount.[4]

§ 1358. In the *fourth* place, as to the transferrer by delivery, the act of transfer by delivery of a negotiable instrument falls under the general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it. Therefore, if the signature of the indorser be forged, the bank discounting the bill or note offered for discount with such indorsement upon it may recover back the amount from the party from whom it received it.[5] And on the same prin-

[1] Hortsman v. Henshaw, 11 How. 177; Meacher v. Fort, 3 Hill (S. C.), 227; Coggill v. American Exchange Bank, 1 Comst. 113; *ante*, § 1354.

[2] MacGregor v. Rhodes, 6 El. & B. 266 (indorser cannot deny indorsement to himself). See Chapter XXI, on Transfer by Indorsement, §§ 672, 673 *et seq.* vol. 1; Bigelow on Estoppel, 429; Story on Notes, § 380.

[3] State Bank v. Fearing, 16 Pick. 533. Note was offered for discount by maker. The name of the payee who was first indorser was forged. *Held* that the bank could recover of the second indorser, whose indorsement was genuine.

[4] *Ante*, §§ 1225, 1355.

[5] Burgess v. Northern Bank of Kentucky, 4 Bush (Ky.), 600 (1868); Cabot Bank v. Morton, 4 Gray, 157; see Chapter XXII, on Transfer by Assignment, vol. 1, §§ 731, 732 *et seq.*

ciple, the maker of a note, or the acceptor of a bill, making payment to a holder under a forged indorsement, would be entitled to recover back the money. And this principle would apply even if the holder who transfers the paper is an agent, unless he discloses his principal.[1] As to the holder of a bill who presents it to the drawee for payment, "He," says Allen, J., "is held to a knowledge of his own title, and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument."[2] How far he may warrant the drawer's signature we shall presently consider.[3]

§ 1359. *When drawee or acceptor bound, though drawer's name be forged.—Fifthly.* In respect to the drawee or acceptor of a bill, it is obvious that his relation to the instrument is very different from that of the parties who issued it. He should know his own correspondent's handwriting; and therefore the doctrine is laid down by numerous authorities that if he accepts the bill, or pays it, he cannot afterward, on discovering that the signature of the drawer was a forgery, revoke the acceptance, or recover back the amount paid under mistake from the holder to whom he paid it.[4]

§ 1360. A leading case on this subject, which is often quoted as authority, is Price v. Neal,[5] which was an action by Price to recover from Neal the amount paid him on two bills of exchange, of which Price was the drawee. One of the bills had been paid by Price without acceptance, and the other was duly accepted and paid at maturity. Both

[1] Lyons v. Miller, 6 Grat. 439.

[2] White v. Continental Nat. Bk. 64 N. Y. 320. [3] § 1361.

[4] Byles on Bills (Sharswood's ed.) [*321], 491; 2 Parsons N. & B. 590, 591; Story on Bills, § 411; Howard v. Mississippi Valley Bank, 28 La. 728–9, the drawee bank having other genuine drafts of the drawer in his hands, and the means of comparing signatures.

[5] 3 Burr. 1355 (1763). See Allen v. Fourth Nat. Bank, 59 N. Y. 12, for explanation and limitation of this case.

bills had been forged. It was held the action could not be maintained, chiefly upon the ground that the acceptor is presumed to know the drawer's handwriting, although there were intimations that there had been laches in notifying the holder of the forgery.

There are other English cases which maintain this doctrine,[1] and in the United States Mr. Justice Story has declared, in an opinion of the Supreme Court, that "after some research we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own."[2] And in commenting on the case of Price v. Neal, he observed: "In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated on this judgment as being in the same predicament and entitled to the same equities."

§ 1361. Notwithstanding these high authorities, and numerous other cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance,[3] or afterward,[4] a distinction has been taken between the two cases which is clearly philosophical,

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[1] Smith v. Mercer, 6 Taunt. 76; 1 Marsh. 453 (1815). There had been delay of a week in returning the bill, but this was not the ground of decision. See Smith v. Chester, 1 Term. R. 654 (1787).

[2] Bank of U. S. v. Bank of Georgia, 10 Wheat. 333 (1825).

[3] National Park Bank v. Ninth National Bank, 46 N. Y. 81; Gloucester Bank v. Salem Bank, 17 Mass. 43, Parker, C. J.; Bank of Commerce v. Union Bank, 3 Coms. 235, Ruggles, J.; Goddard v. Merchants' Bank, 4 Coms. 149, Bronson, C. J.; Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 239, Cowen, J.; Bernheimer v. Marshall, 2 Minn. 81; Stout v. Benoist, 39 Mo. 280; see also National Bank of Commerce v. National M. B. Assoc'n, 55 N. Y. 213; White v. Cent. N. B. 64 N. Y. 322.

[4] Ellis v. Ohio Life Ins. &c. Co. 4 Ohio St. 632, Ranney, J.

and as it seems to us much better calculated to effectuate justice than the doctrine of Mansfield and Story.[1]

When the holder has received the bill after its acceptance, the acceptor stands towards him as the warrantor of its genuineness, and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed the acceptor, being the primary debtor, stands just as the maker of a genuine promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance or payment, the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment, as such. If he indorses it, he warrants its genuineness;[2] and his very assertion of ownership is a warranty of genuineness in itself.[3] Therefore, should the drawee pay it or accept it upon such presentment, and afterward discover that it was forged, he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence.

§ 1362. In all the cases which hold the drawee absolutely estopped by acceptance or payment from denying genuineness of the drawer's name, the loss is thrown upon him on the ground of negligence on his part in accepting or paying, until he has ascertained the bill to be genuine.[4] But the holder has preceded him in negligence, by himself not ascertaining the true character of the paper before he received it, or presented it for acceptance or payment. And although as a general rule, the drawee is more likely to know the drawer's handwriting than a stranger is, if he is in fact deceived as to its genuineness, we do not perceive that he should suffer more

[1] See an able article on this subject in American Law Review for April, 1875, p. 411.

[2] National Bank v. Bangs, 106 Mass. 445.

[3] See §§ 731, 732, vol. 1.

[4] Ellis v. Ohio Life Ins. &c. Co. 4 Ohio St. 662.

deeply by a mistake than a stranger, who, without knowing the handwriting, has taken the paper without previously ascertaining its genuineness. And the mistake of the drawee should always be allowed to be corrected, unless the holder acting upon faith and confidence induced by his honoring the draft, would be placed in a worse position by according such privilege to him. This view has been applied [1] in a well considered case, and is intimated in another;[2] and is forcibly presented by Mr. Chitty, who says it is going a great way to charge the acceptor with knowledge of his correspondent's handwriting, "unless some *bona fide* holder has purchased the paper on the faith of such an act."[3] Negligence in mak-

[1] McKleroy v. Southern Bank of Ky. 14 La. Ann. 458. In this case the drawees, McK. & B., accepted the draft about the 1st of December, and paid it on the 18th. It turned out that the drawer's signature was forged. The Southern Bank of Kentucky had purchased the draft before acceptance, and had received payment of it; and McK. & B. sued the bank to recover back the amount. The Court said: "The defendant became the holder of the draft before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently before the defendant had any right of action against them for its recovery. The plaintiffs therefore had done no act which induced the defendant to believe the signature of the drawer to be genuine at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiff's acceptance, or on their guarantee of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or were then guilty of the omission of any duty toward the defendant as the purchaser of the bill? If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, or would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record. The defendant purchased the bill on the faith of the indorsement of Shotwell & Son, which was a warranty of the genuineness of the drawer's signature to the bank; and there is no good reason why the accidental payment made by the plaintiffs should inure to the benefit of the defendant."

[2] Canal Bank v. Bank of Albany, 1 Hill, 287, Cowen, J.

[3] Chitty on Bills (13th Am. ed.) [*431], 485, where it is said: "It has been contended that if the party paid was a *bona fide* holder, ignorant of the forgery, then he ought not to be obliged to refund under any circumstances, although he could not have enforced payment, and although he had immediate notice of the forgery, because the drawee was bound to know the handwriting of the drawer, and the genuineness of the bill, and because the holder being ignorant of the forgery, ought to have the benefit of the accident of such payment by mistake,

ing payment under a mistake of fact is not now deemed a bar to recovery of it,[1] and we do not see why any exception should be made to the principle, which would apply as well to release an obligation not consummated by payment.

§ 1363. *The admission of the acceptor* extends only to the signature of the drawer, and not to the terms of the instrument itself. And when the signature is genuine, but the amount in the body of it has been altered after it left the drawer's hand, and he has paid the excessive amount to a *bona fide* holder, he may recover it back from him, provided he was not himself negligent in disregarding evidences that the instrument had been tampered with, which appeared upon its face.[2] And as the holder demanding payment war-

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and not to be compelled to refund. But on the other hand, it may be observed, that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason why he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an immediate notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found, in examining the older cases, that there were facts affording a distinction, and that upon attempting to reconcile them, they are not so contradictory as might, on first view, have been supposed."

[1] See *post*, § 1369, and Chapter XLIX, on Checks, Sections XIII and XIV.

[2] White v. Continental N. B. 64 N. Y. 317; Kingston Bank v. Eltinge, 40 N. Y. 323. See *ante*, § 540, vol. 1; Bank of Commerce v. Union Bank, 3 Comst. 230. The draft in this case was originally drawn upon the bank plaintiff, payable to order of J. Durand, for one hundred and five dollars. The name of Durand was altered to Bennet, and the word hundred to thousand; and as altered was paid. And the plaintiff sued the indorsee to whom it had been paid, to recover back the whole amount. Ruggles, J., delivering the opinion of the court that the plaintiff should recover, said: "There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks of the canal and banking company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The

rants the genuineness of the instrument under which such demand is made, we should say that the negligence of the payor should be very great and positive, to deprive him of the right of restitution. But if the drawer had drawn the bill so carelessly as to afford an opportunity for the alteration to be made without disfiguring, marring, or marking the instrument in such a way as to attract the attention of a prudent man, it has been held that he would then be chargeable in his account with the drawee;[1] and therefore he could not recover back the amount paid to the holder.[2]

§ 1364. But the drawee who accepts or pays a bill is never regarded as thereby admitting the genuineness of the signature of an indorser; for although it is true that every indorser is in respect to his liability the same as a new drawer to the bill, yet the acceptor cannot be presumed to have any such knowledge of this signature as he has of the drawer's, and therefore he is not presumed to admit it.[3] If the drawee or acceptor of a bill were to pay it, and it turned out that the indorsement of the payee or a special indorsee were forged, the result would be that he could not charge the amount in account against the drawer, and that the payment would be invalid; but as his act implies no admission of the genuine-

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forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would be answerable for negligence in paying an altered bill, if the alteration were manifest on its face." See Chapter on Checks.

[1] Young v. Grote, 4 Bing. 253 (see Chapter XLIX, on Checks, Section XIV). This case does not conflict with the case of Bank of Commerce v. Union Bank, cited above, as in that case there was no negligence on the part of the drawer.

[2] Bank of Commerce v. Union Bank, 3 Comst. 230. See Hortsman v. Henshaw, 11 How. 177.

[3] See *ante*, § 538, vol. 1; Story on Bills, §§ 262, 412; Edwards, 190, 290, 400; 2 Parsons N. & B. 590; White v. Continental Nat. Bank, 64 N. Y. 320.

ness of the indorser's signature, he could recover back the amount from the holder to whom he paid it.[1] "Neither acceptance nor payment," says Cowen, J., in a case cited below, "at any time nor under any circumstances, is an admission that the first or any other indorser's name is genuine."[2] The payee, or indorsee of a bill, or note, whose signature has been forged to an indorsement upon it, may recover upon it; and such a payee or indorsee of a check paid by a bank upon his forged indorsement, may recover the amount of the bank.[3]

§ 1365. The distinction between the acknowledgment of the drawer's and of the indorser's signature is carried so far that, if the bill be made payable to the drawer's own order, and indorsed by him, the acceptance is regarded as admitting the drawing only, and not the indorsement, although the name is the same, and they profess to be, and apparently are, written by the same party.[4] If, however, the name of the drawer be fictitious, and the indorsement is in the same name and handwriting, it would be different; for then acceptance by acknowledging the drawing would impliedly acknowledge the indorsing also.[5]

§ 1366. Yet there may be circumstances under which the acceptor, who has paid a bill under a forged indorsement, could not recover the amount from the holder. Thus, if the forged indorsement were upon the bill at the time when the bill was issued by the drawer, the drawer or acceptor paying it could not maintain an action to recover the amount from the holder, for the reason why such actions are generally allowed would not apply. The holder could himself recover from the drawer, as the latter could not deny the genuineness of signatures which he had himself sent into the world. For

[1] Ibid.; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Smith v. Chester, 1 T. R. 654; Robinson v. Yarrow, 7 Taunt. 455; 2 Parsons N. & B. 590.

[2] Canal Bank v. Bank of Albany, *supra*.

[3] Johnson v. First Nat. Bank, 13 N. Y. S. C. (6 Hun), 124; Talbot v. Bank of Rochester, 1 Hill, 295.

[4] Beeman v. Duck, 11 M. & W. 251; Robinson v. Yarrow, 7 Taunt. 455; Williams v. Drexel, 14 Md. 566; Story on Bills, §§ 412, 538, vol. 1.

[5] Cooper v. Meyer, 10 B. & C. 468; 5 Man. & G. 387.

the like reason the drawer or acceptor could charge the amount in account against the drawer. And the rule would not be altered where the acceptor had no funds of the drawer in his hands; for if he chose to accept for the drawer's accommodation, that is no reason why he should recover from the holder.[1] This view has been taken by the United States Supreme Court, and seems also to obtain in New York; but in that State it is confined in its application to cases where the payee whose name is forged had no interest in the bill.[2]

If the acceptor of a bill accept and negotiate the bill with knowledge that there is a forged indorsement upon it, he would be thereby estopped to deny its genuineness.[3]

§ 1367. *Several exceptions* are taken, even where the general rule is recognized, to the doctrine that the drawee or acceptor is precluded from recovering back the amount paid on

[1] Hortsman v. Henshaw, 11 How. 177 (1850); Coggill v. American Exchange Bank, 1 Coms. 113 (1847). It is not stated in this case that the bill was put in circulation by the drawer.

[2] In Bigelow on Estoppel, 432, and in Redfield & Bigelow's Leading Cases, 61, it is said, in remarking on the case of Hortsman v. Henshaw: "A similar case arose in 1847, in Coggill v. American Exchange Bank. In that case one of the drawers of the bill forged the payee's name, and then procured it to be discounted, and at maturity the plaintiff (the drawee) paid it. On discovering the forgery, he sued the defendant, a *bona fide* holder, to whom he had paid the bill, to recover the sum paid. The court held that the action could not be maintained, but based their decision on the fact stated in the report that the payee had no interest in the bill, comparing it to a bill payable to a fictitious person, such a bill being in effect payable to bearer. The point made in Hortsman v. Henshaw was not noticed—that in such cases the drawer is estopped to deny the genuineness of the indorsement; that he is thus liable to a *bona fide* holder; and that, therefore, the drawee is entitled on payment to a credit against the drawer. Whence it would follow that it is immaterial that the payee had no interest in the bill, when the drawee himself puts it into circulation bearing the payee's indorsement. But, according to Coggill v. American Exchange Bank, explaining on this point Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287, if the payee owned the forged bill, the acceptor would be entitled to recover the sum paid to the holder. The two cases cannot be reconciled, unless the language of the court in Hortsman v. Henshaw is used with reference to the case of a payee having no interest in the bill. But that cannot be true; for how, then, could it be said that in such case the drawee has paid to one not entitled to receive the money? The case clearly covers the whole ground of a payee who owned the bill, and of one who had no interest in it."

[3] Beeman v. Duck, 11 Mees. & W. 251.

a forgery of the drawer's signature. *First:* Where payment is made to the payee; for it is said the payee can be no loser by refunding money paid under such a forgery. His debt against the one whose name was forged as drawer, if the latter owed the payee anything, would remain—it could not be paid by a forgery. He could still recover it, whether he refunded to the acceptor or not. And so, not being involved in any loss by being required to refund, it would be great injustice to the acceptor to allow the payee to retain the money.[1] *Secondly:* It has been considered that the general rule would not apply where either by express agreement, or a settled course of business between the parties, or by a general custom in the place applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and by his negligent failure to perform it has contributed to induce the drawee to act upon the paper as genuine, and to advance the money upon it. And so, also, where the parties are mutually in fault.[2] We think it far better not to recognize the general principle at all save in favor of a holder who has taken the paper on the faith of the drawee's recognition of it as genuine.

§ 1368. Where a party makes payment for the honor of the drawer, without having first seen the bill, and without negligently omitting to do so, he would not be precluded

[1] Redfield & Bigelow's Leading Cases, 664.

[2] Redfield & Bigelow's Leading Cases, 665; Bigelow on Estoppel, 428, note 2, 445; Ellis v. Ohio Life Ins. &c. Co. 4 Ohio St. 628. In this case it was shown that, by the course of dealing between banks in Cincinnati, checks presented by one bank, drawn by individuals on other banks, were always received from the bankers presenting them in bundles, with a ticket mark on the back stating the amount of the checks, and that, when such checks were presented, the banks were not accustomed to exercise that scrutiny which was usual when the checks were presented by a stranger, it being presumed that caution had already been exercised by the bank taking the check. The check in this case had been added up against the drawer, and the forgery was not discovered for ten days. It was held that, under the circumstances, the bank on which it was drawn could recover the amount from the bank which presented the check. See, also, National Bank of N. A. v. Bangs, 106 Mass. 441.

from recovering back the amount upon discovering, as soon as he saw the bill, that it was a forgery, and pronouncing it such; and it would make no difference that it was too late to send due notice of dishonor to the indorser.[1]

SECTION IV.

RECOVERY OF MONEY PAID UPON FORGED INSTRUMENTS.

§ 1369. It is a general principle of law that money paid under a mistake of fact may be recovered back.[2] And accordingly, where one pays money on forged paper by discounting or cashing it, he can always recover it back, provided he has not himself contributed materially to the mistake by his own fault or negligence, and provided that by an immediate or sufficiently early notice he enables the party to whom he has paid it to indemnify himself as far as possible.[3] And now the doctrine is favored that even negligence in making the mistake is no bar to recovery.[4] This rule is of general application; but in order to understand it, it will be necessary to consider the circumstances and relations of the parties who contend for or against it; and this we shall presently proceed to do.

It follows from the rule as stated, that if a valid instrument be rendered up, and one that is forged given in place thereof, it will constitute no valid payment;[5] and even an indorser of the note surrendered up will not be discharged—his liability having been fixed by due demand and notice.[6]

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[1] Goddard v. Merchants' Bank, 4 Coms. 149.

[2] Carpenter v. Northborough Nat. Bank, 123 Mass. 69; Nat. Bank of N. A. v. Bangs, 106 Mass. 441; Boylston Nat. Bank v. Richardson, 101 Mass. 287; Merriam v. Wolcott, 3 Allen, 258; Welch v. Goodwin, 123 Mass. 71. See §§ 1655 *et seq.*

[3] Allen v. Sharpe, 37 Ind. 73; 2 Parsons N. & B. 597.

[4] Lawrence v. American Nat. Bank, 54 N. Y. 435; National Bank of Commerce v. National M. B. A. 55 N. Y. 211; see *ante*, § 1362.

[5] Allen v. Sharpe, 37 Ind. 68; Bell v. Buckley, 11 Exch. 631; Goodrich v. Tracy, 43 Vt. 319; Ritter v. Singmaster, 73 Penn. St. 400.

[6] Ritter v. Singmaster, 73 Penn. St. 400.

In Massachusetts, where A. through fraud obtained a promissory note from B., signed by him, payable to the order of C., and then forged the indorsement of C. and got the note discounted at a bank, and B. paid the note at maturity to the bank, it was held that B. could maintain an action for money had and received against the bank, although it acted in good faith in taking the note.[1]

§ 1370. When a bank pays forged paper of a depositor, and returns it to him with his check book or account book, such depositor may of course immediately repudiate the charge entered up against him, as it has been improperly made.[2] And it seems further that the depositor owes the bank no duty which requires him to examine his pass book or vouchers, with a view to detection of forgeries of his name, and may therefore repudiate such a charge whenever the forgery is discovered. And accordingly, where it appeared that checks were forged by the confidential clerk of the depositor, paid by the bank, and charged to the depositor on his bank book, the book balanced, and the forged checks returned to the clerk, who examined the account at the principal's request, and reported it correct, and the principal did not discover the forgery until several months afterward, when he immediately informed the bank, it was held that the

[1] Carpenter v. Northborough National Bank, 123 Mass. 69, Lord, J.: "This is simply the payment of a note to a party who has no legal or equitable right interest in the promise of the maker. * * * The money having been paid by mistake to a person who has no right to demand it, the case is within the general rule, and the party paying may recover back the amount thus paid." To same effect see Welch v. Goodwin, 123 Mass. 77, Lord, J., saying: "The question we are called upon to decide is whether, under any circumstances, a party may recover back money paid upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake, whether arising from natural or temporary infirmity, or otherwise, made without fault upon his part, entitles him to the same relief."

[2] Mackintosh v. Eliot National Bank, 123 Mass. 393. *Held*, bank not absolved from liability to depositor, because his name was forged by a clerk on a blank form taken from depositor's check book, and stamped with his office stamp.

amount could not be retained by the bank, as the depositor had done nothing to contribute to or facilitate the fraud.[1] Where forged commercial paper is paid without inspection, under circumstances giving the party paying no previous opportunity for inspection, he is not precluded from receiving back the amount paid. But he is bound to use due diligence in making the inspection, as soon as he has the opportunity, and in giving notice of the forgery.[2]

§ 1371. *When notice of forgery must be given, and demand for restitution made.*—It is undoubtedly necessary that the maker, acceptor or other party who demands restitution of money paid under a forged indorsement, or under a forged signature of the drawer of a bill, should make the demand without unreasonable delay. Where there is an indorser upon the instrument, which was surrendered up by the holder, who was entitled to notice, the return of the instrument and demand for the money must be made in time for the holder to notify the indorser, according to the English authorities. And a delay until the day after payment has been considered fatal.[3] Seven,[4] ten,[5] fourteen,[6] fifteen[7] days

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[1] Weisser v. Dennison, 10 N. Y. 69; National Bank v. Tappan, 6 Kansas, 465. See §§ 1655 *et seq.*

[2] Allen v. Fourth National Bank, 59 N. Y. 12.

[3] Cocks v. Masterman, 1 B. & C. 902 (17 E. C. L. R.) In this case, bankers who had paid a forged bill gave notice of the forgery, and demanded the money by one o'clock on the following day. The Court said: "In this case we give no opinion on the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to the other parties to the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it became due, whether it is an honored or dishonored bill; and that, if he receives the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any other steps against the other parties to the bill till the day after it is dishonored. But he is entitled so to do if he thinks fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right to take steps against the parties to the bill on the day when it becomes due." Mather v. Maidstone, 18 Com. B. 273; Bigelow on Estoppel, 442.

[4] Smith v. Mercer, 6 Taunt. 76.

[5] Ellis v. Ohio Life, &c. Co. 1 Handy, 97, overruled in same case, 4 Ohio St. 648.

[6] Davies v. Watson, 2 Nev. & M. 709.

[7] Gloucester Bank v. Salem Bank, 17 Mass. 33.

have been held to be too great delays, independent of any question in regard to an indorser, whom it was then too late to notify of dishonor.

§ 1372. But there is high authority for the more liberal, and, we think, wiser and juster doctrine, that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere space of time is not important, provided it be clearly shown that the holder will be put to no more liability, trouble or expense by a restoration then, than if it had been called for on the day of payment.[1] Nor does the circumstance that there are genuine indorsers prior to the holder, but subsequent to the forged name, seem to us to alter the case. Their indorsement of the instrument being a warranty of its genuineness, they would not be entitled to notice, as it was not genuine in all respects;[2] and besides the right to sue them as indorsers, the holder, on being compelled to refund the money, could recover back the amount paid by him to his predecessor, and so on, until the instrument rested where the loss should fall. This view was most forcibly presented in New York, where the drawee paid the bill upon which the payee's name had been forged; and it was held that he could recover back the amount, although over two months had elapsed before notice of the forgery was given, and there were indorsers prior to the holder, whom it was, of course, too late to notify of dishonor in due form.[3]

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[1] Third Nat. Bank v. Allen, 59 Mo.; Koontz v. Central Nat. Bank, 51 Mo. 275; 2 Parsons N. & B. 598. See White v. Continental Nat. Bank, 64 N.Y. 316; Welch v. Goodwin, 123 Mass. 77.

[2] See Chapter XXXIII, on Excuses for Want of Notice, § 1113; Goddard v. Merchants' Bank, 4 Comst. 149; Ellis v. Ohio Life, &c. Ins. Co. 4 Ohio St. 658.

[3] Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 291 (1841), Cowen, J., saying: "I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said, the defendants had indorsers behind them; and by delay they were prevented from charging them, by giving seasonable notice. Admit this to be so; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defendants till they acci-

§ 1372*a*. If a person wrongfully convert a bill or note and receive the amount, the owner may either sue in tort, or may waive the tort and recover the money as received to his use.[1] And the party wrongfully collecting, and holding on deposit, the amount paid to him, upon a check bearing a forged indorsement, is liable to the owner, notwithstanding he may have forwarded the check in a negligent manner; such negligence being collateral to the transaction, and not the proximate cause of leading the third party into the mistake committed.[2]

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dentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel (Cocks v. Masterman, 9 Barn. & Cress. 902), that he would exact as great, indeed greater, diligence in giving notice than is necessary to fix an indorser."

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"I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness or delay, or both."

[1] Lamine v. Dorrell, Ld. Raymond, 1216; Neate v. Harting, 6 Exch. 349; Hollins v. Fowler, 44 L. J. (Q. B.) 169; Arnold v. Cheque Bank, 1 C. P. Div. L. R. 578.

[2] Arnold v. Cheque Bank, 1 C. P. Div. L. R. 578 (1876).

CHAPTER XLIII.

ALTERATION OF NEGOTIABLE INSTRUMENTS.

SECTION I.

DEFINITION AND NATURE OF ALTERATION.

§ 1373. Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation.

This principle of law is essential to the integrity and sanctity of contracts; and in England it has been extended to a degree which has not found favor in the American courts. There it has been adjudged that a deed, bill, note, guaranty, or other written executory contract is avoided by any material change in the terms thereof, although that change be made by a stranger, upon the ground that the custodian of an instrument is bound to preserve its integrity, and as it would be avoided if altered by himself, so it should be avoided if, through his negligence, it were altered by another.[1] And the like views prevail in Scotland.[2]

In the United States, a more liberal view prevails as to the rights of the beneficiary of a written contract, and if a stranger, without any complicity with him, intermeddles and

[1] Master v. Miller, 4 Term R. 320; 2 H. Bl. 140, where the alteration was made by a stranger. Davidson v. Cooper, 11 M. & W. 778; 13 M. & W. 243.

[2] Robinson's Practice (N. ed.), 137; Byles on Bills (Sharswood's ed.), 472; Murchie v. Macfarlane, Thomson on Bills, 110.

changes its terms, he is deemed a spoliator, and the act is termed a spoliation, being an infringement of the right of all parties; but it is considered more the misfortune than the fault of the holder, that a third party should have trespassed on his property, and he is not, therefore, made the victim of his conduct. Therefore, the term alteration in this country is understood to signify a material change in the contract by a party thereto, and no spoliation will avoid a bill or note (being the act of a stranger), unless it be so great as to render the words unintelligible or uncertain, in which case, it is regarded as a virtual destruction of it.[1]

The English doctrine that spoliation by a stranger avoided the instrument, has been characterized by Judge Story as repugnant to common sense and justice, and deserving no better name than a technical quibble.[2] In California, where a draft was delivered to S. for plaintiff, and S. altered it, it was held in the absence of proof, that the plaintiff authorized the alteration to be a spoliation, and not to vitiate the draft.[3] Alteration may be made before delivery to the payee as well as afterward. Thus if a note be signed by a surety, or co-party, and left in the hands of a co-principal, be altered before delivery by one of the promisors, the surety co-promisor is discharged, although the alteration be made without the payee's knowledge.[4] And if a note be indorsed by the payee for the maker's accommodation, be materially

[1] Piersol v. Grimes, 30 Ind. 129 (1868); Crockett v. Thomason, 5 Sneed, 342; Bigelow v. Stephen, 35 Vt. 521; Terry v. Hazlewood, 1 Duvall, 101; Lubbering v. Kohlbrecher, 22 Mo. 596; Medlin v. Platte & Co. 8 Id. 235; Ford v. Ford, 17 Pick. 418; Lee v. Alexander, 9 B. Mon. 25; Waring v. Smith, 2 Barb. Ch. R. 119; Davis v. Carlisle, 5 Ala. 707; Vogle v. Ripper, 34 Ill. 106; Blakey v. Johnson, 13 Bush (Ky.), 197; Laugenberger v. Kroeger, 48 Cal. 147; Cochran v. Nebeker, 48 Ind. 459; Bucklen v. Huff, 53 Ind. 474.

[2] United States v. Spalding, 2 Mason, 478.

[3] Laugenberger v. Kroeger, 48 Cal. 147.

[4] Greenfield Savings Bank v. Stowell, 123 Mass. 196; Draper v. Wood, 112 Mass. 315; Wood v. Steele, 6 Wall. 80; Fay v. Smith, 1 Allen, 477; Goodman v. Eastman, 4 N. H. 455; 17 American Rep. 92, 97; Blakey v. Johnson, 13 Bush (Ky.), 202; Bank of U. S. v. Russell, 3 Yates, 391; Aldrich v. Smith, 37 Mich. 470; Bradley v. Mann, 37 Mich. 1; *contra*, Bingham v. Reddy, 5 Ben. 266.

altered, however innocently by the accommodation maker, and then discounted, the holder cannot recover.[1]

§ 1374. It was insisted at one time that the avoidance by alterations applied only to deeds, because of their solemn character, but where the date of a bill was altered by the payee, and then indorsed by him to a holder for value without notice, it was held that the latter could not recover, and it was well said by Ashurst, J.:[2] "There is no magic in parchment or wax, and the principle to be extracted from the cases is that any alteration avoids the contract." And such are the constant and essential uses to which negotiable instruments are put, that it has been considered that more dangerous consequences would flow from a leniency toward alterations in bills and notes than in deeds.[3]

§ 1375. The alteration may consist in changing (1) its date, or (2) the time or (3) place of payment, or (4) the amount of principal or (5) interest to be paid, or (6) the medium or currency in which payment is to be made, or (7) the number or the relations of the parties, or in (8) the character and effect of the instrument as matter of obligation or evidence.

And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for another, or by obliterating or subtracting from it some provision incorporated in it.

It will be no answer to a plea of alteration that its operation is favorable to the parties affected by it, whether in lessening the amount to be paid, enlarging the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases when varied to be that other's act, and it suffices for him to say, "*Non hæc in fœdera veni.*" It may be questioned whether or not prolongation of time, decrease of

[1] Aldrich v. Smith, 37 Mich. 470.

[2] Master v. Miller, 4 Term R. 320; 2 H. Bl. 140.

[3] U. S. Bank v. Russell, 3 Yeates, 391.

amount, or other apparently beneficial alteration, is really so. A debtor may make provision for payment on one day, and not be ready on another. A decrease of the amount destroys the identity, and confuses the traces of his obligation, and every reason of policy and principle forbid that the laws should tolerate tampering with the rights and engagements of others. In Indiana, where the note bore interest at ten per cent. and the holder inserted the words "after maturity" it was held that these words avoided it "because they changed in a material matter, the legal effect of the note" although they did not operate to the prejudice of the maker.[1] An alteration of a bill before acceptance discharges drawer and indorsers.[2] Evidence of alteration is admissable under a plea of *non assumpsit*, or *nil debet*,[3] but it is safer to allege the alteration.[4]

SECTION II.

ALTERATIONS OF DATE, TIME, PLACE, AMOUNT, AND MEDIUM OF PAYMENT.

§ 1376. In the *first* place, as to the DATE of the bill or note, it is obviously a most material part of it, indicating the time it became a subsisting contract, and the time when the contract is to be performed in many cases, and a thousand circumstances may arise adding additional consequence to the question when the instrument was issued. Therefore, any change in the date imparts a new legal effect and operation to it, and is a material alteration, which avoids it as against prior parties and sureties even in the hands of a *bona fide* holder without notice.[5]

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[1] Coburn v. Webb, 56 Ind. 100.

[2] Bathe v. Taylor, 16 East, 412.

[3] Boomer v. Koon, 13 N. Y. S. C. (6 Hun), 645; Cook v. Coxwell, 2 C. M. & W. 291.

[4] Van Santvoord on Pleading (3d ed.), 565.

[5] Master v. Miller, 4 Term R. 320; 2 H. Bl. 140; Owings v. Arnot, 33 Miss. 406; Britton v. Dierker, 46 Mo. 592. See as to Checks, § 1658.

It matters not that the time of payment, by relation to the date, may be prolonged, for suffice it to say it was not the time agreed on. Thus, in a case before the United States Supreme Court, where the maker of the note, drawn payable one year from date, changed "September 11" to "October 11" before delivery, without consent of his surety, it was held that the note was avoided as to him.[1]

The alteration may be in the year,[2] or the month,[3] or the day of the month,[4] or in all three.[5]

Even where a note was altered in date to one day previous, and the effect as to its time of maturity remained unchanged, because of the circumstance that originally it would have fallen due, as its face imported, on Sunday, and therefore would have been legally due on Saturday, and by the change of date it fell due on Saturday, so that in point of fact, Saturday in either case was its day of payment, it was held that it was avoided by the alteration.[6] And the decision seems clearly right. The maker appeared to be bound as of a day prior to his binding himself. The identity of his contract was destroyed, and its legal effect changed. Questions of his own and of others' solvency might arise, making a day material. His memory and his memoranda might be challenged or contradicted. And then, although no actual injury might result, the inflexibility of the principle is essential to prevent its possibility.

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[1] Wood v. Steele, 6 Wall. 80 (1867), Swayne, J., saying: "The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed, and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged."

[2] Russel v. McNab (Scotch case), Thomson on Bills, 111.

[3] Jacob v. Hart, 2 Stark. 45.

[4] Outhwaite v. Luntly, 4 Camp. 179; Master v. Miller, 4 T. R. 320; see *supra*.

[5] Walton v. Hastings, 4 Camp. 223.

[6] Stephens v. Graham, 7 Serg. & R. 505.

It has been held, that the date of an indorsement or assignment is not a material part of it, and that an alteration of it will not vitiate the holder's title to the whole amount;[1] but the date may be very material when the question arises whether or not the indorsement was made before or after maturity, and this doctrine does not seem to us maintainable.

§ 1377. *Alteration in time of payment.*—In the *second* place, as to the TIME of payment, specified or implied in the bill or note, a change of such time is obviously of the same nature as a change in the date, identical in principle and effect; and whether such change delays, accelerates, or preserves in legal effect the time specified or implied for payment, it constitutes a material alteration.[2] Thus, if the note be changed so as to fall due a year later,[3] or if the bill be payable on demand, and is altered to read one day after date, it is materially varied;[4] so a substitution of "after date" for "after sight;"[5] or the date of day, or month, or year, effects the same result.[6] And where a party gave authority to another to draw a bill upon him at "ninety days from the 10th of April," an alteration to the "16th of April," unauthorized by him, was held to discharge his liability as acceptor under the authority, although the time of payment was extended six days.[7]

§ 1378. *Alteration in the place of payment.*—In the *third* place, as to PLACE of payment, when the bill or note has been drawn payable at a particular place, the obliteration of such place so as to make it payable generally constitutes a material alteration as against all parties not consent-

[1] Griffith v. Cox, 1 Tenn. 210.

[2] Miller v. Gilleland, 19 Penn. St. 119; Lesler v. Rogers, 18 B. Mon. 528; Outhwaite v. Luntley, 4 Camp. 179; Bathe v. Taylor, 15 East, 412.

[3] Wyman v. Yeomans, 84 Ill. 403.

[4] Murdoch v. Lee, 4 Pat. Ap. Ca. 261 (Scotch case), Thomson on Bills, 111, the object being, as the annotator observes, to make the bill bear interest.

[5] Long v. Moor, 3 Esp. 155, note; Anderson v. Langdale, 3 B. & Ad. 660.

[6] Thomson on Bills (Wilson's ed.), 111; Lewis v. Kramer, 3 Md. 265.

[7] Lewis v. Kramer, 3 Md. 265. See Benedict v. Miner, 58 Ill. 19.

ing;[1] and likewise where no place is designated, it is a material alteration to insert one.[2] And *a fortiori* it is a material alteration to obliterate one place and insert another; as, for instance, to erase an acceptance payable at "Bloxham & Co.'s," and insert the name of "Esdaile & Co." in lieu.[3] Where the drawer of a bill, after acceptance, and without acceptor's consent, wrote after the acceptance "payable at Mr. B.'s, Chiswell street," it was held a material alteration, and the acceptor discharged;[4] though in England it was formerly held otherwise.[5] So, striking out "in London," and thus making the bill payable generally.[6] So, adding to a note "payable at the Bank of Smyrna."[7] Even a *bona fide* holder cannot recover upon an acceptance so altered, nor upon a note so altered against parties prior to the one making the alteration.[8] Changing the place of date would change the rights of the parties, and hence is an alteration.[9]

§ 1379. In England and in many of the United States, it is provided by statute that acceptances of bills drawn payable at a banking house, or other particular place, shall be deemed general acceptances, unless the drawer adds special words limiting the payment to a particular place. The effect of these statutory provisions is that it is not nec-

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[1] McCurbin v. Turnbull (Scotch case), Thomson on Bills, 112.

[2] Chitty on Bills (13th Am. ed.) [*183, 184], 209–211; Nazro v. Fuller, 24 Wend. 374; Whitesides v. Northern Bank, 10 Bush (Ky.), 501. In this Kentucky case the indorsee of a bill, accepted generally, caused to be written after the word "accepted" the additional words "payable at the First National Bank of Franklin," it was *held*, that all parties not consenting to the alteration were discharged.

[3] Tidmarsh v. Grover, 1 Maule & S. 735 (1813).

[4] Cowie v. Halsall, 4 B. & Ald. 197 (E. C. L. R.); 3 Stark. 36; see also Tidmarsh v. Grover, 1 Maule & S. 735; Rex v. Treble, 2 Taunt. 328.

[5] Trapp v. Spearman, 3 Esp. 57, in which case the insertion in a bill "when due at the Crosskeys, Blackfriar's Road," was held immaterial. See also Marson v. Petit, 1 Camp. 82.

[6] Burchfield v. Moore, 25 Law & Eq. 123; 5 El. & B. 683.

[7] Sudler v. Collins, 2 Hous. 538. See also Morehead v. Parkersburg Nat. Bank, 5 W. Va. (Hagans), 74.

[8] Nazro v. Fuller, 24 Wend. 374; Sudler v. Collins, 2 Hous. 538.

[9] Mahaiwe Bank v. Douglass, 31 Conn. 170.

essary to aver or prove presentment at such place in an action against the acceptor, who, however, may show any loss resulting from non-presentment there. But an indorseris absolutely discharged by failure to make due presentment there.[1]

These provisions do not affect the rules applying to alterations, because, though the acceptance be general, the insertion of a particular place induces the holder to present the bill there, instead of to the acceptor himself; and the bill might be treated as dishonored, and the acceptor put to inconvenience, when in fact no presentment had been made.[2] The acceptor has a right to deposit the amount at the particular place designated, and that done his obligation is discharged. Therefore, the insertion of a particular place by the holder would materially vary his rights. Besides, as said by Abbott, C. J.: "Suppose a bill so altered to be indorsed to a person ignorant of the alteration, his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the acceptor is, in consequence, discharged."[3]

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[1] See 1 and 2 Geo. IV, c. 78; Chapter XX, on Presentment for Payment, §§ 641 *et seq.* vol. 1; Chitty on Bills [*182], 209; 2 Parsons N. & B. 548; also Chapter XVIII, § 519, vol. 1.

[2] Ibid.

[3] McIntosh v. Haydon, Ry. & M. 362; to same effect, Desbrowe v. Weatherby, 1 M. & Rob. 438; Cowie v. Halsall, 4 B. & Ald. 497; Taylor v. Moseley, 1 M. & Rob. 439 n.; Gardner v. Walsh,5 El. & B. 83; Burchfield v. Moore, 5 El. & B. 683.

In Burchfield v. Moore, 25 Eng. L. & Eq. 123; 5 El. & B. 683, the holder of a bill, without the acceptor's consent, altered it by inserting "payable at the Bull Inn, Aldgate." Lord Campbell, C. J, said: "By virtue of the 1 & 2 Geo. IV, c. 78, these words, if in the handwriting of the defendant, would still leave the acceptance a general acceptance. Nevertheless, three very eminent judges have successively held—Lord Tenterden, in Mackintosh v. Haydon; Lord Chief Justice Tindal, in Desbrowe v. Weatherby; and Lord Lyndhurst, in Taylor v. Moseley, 6 Car. & P. 273—that such words, although they do not alter the direct liability of the acceptor, do vary the contract between others who are parties to the bill; therefore, that if interpolated without his consent, they may prejudice the acceptor; that they amount to a material alteration of the bill, and that they discharge the acceptor.

"These decisions were only at Nisi Prius, but they have been long acquiesced

And the principle has been applied in a number of American cases.[1]

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in, and we do not disapprove of them. The plaintiff here is a *bona fide* holder for value, without notice of the alteration; but the bill must be considered as vitiated in the hands of a prior holder. The defendant was discharged from his liability as acceptor from the moment when the alteration of the bill had been consummated, and the instrument having ceased in point of law to be an accepted bill, the indorsee afterward could be in no better situation than the indorser. As soon as it is established that there has been a material alteration in a bill of exchange, the particular nature of the alteration becomes immaterial, and Master v. Miller, 4 Term Rep. 320; s. c. 2 H. Black. 140, becomes an authority. There a bill was drawn payable to A. B. While in his possession the date was altered, and the bill being subsequently indorsed to the plaintiffs, who were (like the present plaintiff) *bona fide* indorsees for value, the judgment was that they could not recover against the acceptor. Ashurst, J., says: 'If A. B. had brought the action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody; and the same objection must hold against the plaintiffs who derive title from him.'

"We conceive, therefore, that in this case the plaintiff's remedy is confined to a right to recover the consideration for the bill, as between himself and the party from whom he received it. A similar remedy may be resorted to till the party is reached through whose fraud or laches the alteration was made. He ought to suffer; for 'a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state.' And Lord Denman, in delivering the judgment of the Exchequer Chamber, in Davidson v. Cooper, intimates a strong opinion that Pigot's Case, 11 Rep. 26, in which this principle is acted upon, has hitherto been, and still ought to be, upheld. The negotiability of bills of exchange is to be favored; but with this view, it is material that their purity should be preserved."

[1] Hill v. Cooley, 46 Penn. St. 259; Oakey v. Wilcox, 3 How. (Miss.) 330; White v. Haas, 32 Ala. 430.

Nazro v. Fuller, 24 Wend. 375. In this case there was added to the note the words "payable at Wayne County Bank." Nelson, C. J., delivering the opinion of the court, said: "I was at first inclined to think the addition, even if regarded as annexed to the body of the note, was not such a material alteration as invalidated it, for the reason that the designation of the place of payment did not affect the rights of the makers. * * But, upon further consideration, I am inclined to think, when the courts use the language that the note is payable generally and universally, though the place of payment be fixed, they only mean to say that it is so to be regarded for the purposes of the remedy, and that payment must still be made at the place; and a tender elsewhere is no bar. I have found no authority beyond this; and on speaking of the right of discharge by tender, the language used limits it to the place designated."

But the contrary has been held in American National Bank v. Bangs, 42 Mo. 454. The note sued on was as follows:

"$1,000. St. Louis, October 10, 1866.

"Three months after date, we promise to pay to the order of Fritsch &

§ 1380. Where a bill is addressed to a drawee at a particular town or city, but without any designation of a particular place of payment therein, it has been held that he may name in his acceptance a particular place in the city, without its having the effect of altering the bill so as to discharge the drawer or indorser, the place named becoming *pro hac vice* the place of business of the acceptor.[1] "Such

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Simonton, New York, one thousand dollars, for value received, negotiable and payable without defalcation or discount.

"*Due at Goodyear Bros. & Durand's, New York, Jan.* 10–13.

"BANGS & DEADY."

(Indorsed.)—"FRITSCH & SIMONTON."

The words italicised: "*Due at Goodyear Bros. & Durand's, New York, Jan.* 10–13," were inserted after the execution of the note, and without knowledge of the makers. It was held no alteration. And the Court said: "The question, then, is, whether these words attached to the foot of the instrument, are to be taken as a part of it, or only a private memorandum, which can in no way affect the liability of the maker. It will be found, upon an examination of the authorities upon this question, that where such words are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker, for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and therefore immaterial. Story on Prom. Notes, § 49; Exon v. Russell, 4 M. & S. 505; Williams v. Waring, 10 Barn. & Cres. 2. The same doctrine is fully recognized by the American courts in all the leading cases that have been examined. 19 Johns. 391; 24 Wend. 374.

"It should be kept in mind that this action is against the makers themselves. It was not declared upon as a note payable at the city of New York. There is no contest here as to a right to tender the amount at any designated place of payment, but simply as to the effect of the addition upon their general liability to pay. The principle is everywhere recognized that the maker is generally and universally liable, and a demand at the place is not a condition precedent of payment. Nazro v. Fuller, 24 Wend. 374. The memorandum in this case does not increase or vary, in any respect, the liability of the defendants, and therefore presents no obstacle to the recovery of the plaintiff. It is admitted that in cases where there was a contest between the holder and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. But as to the makers themselves, the question is altogether different. This opinion has proceeded upon the idea that the words in question were simply a memorandum made at the bottom of the note after its execution, and not intended to be a part of the contract itself. Such appears to be the fact, so far as the case is presented here by the record; but we will not assume it to be so for the purpose of entering up judgment in this court. The case proved at the trial did not authorize the declaration of law made by the court that the plaintiff was not entitled to recover."

[1] Troy City Bank v. Lauman, 19 N. Y. 480 (1859); Niagara District Bank v. Fairman, 31 Barb. 405 (1860); Shuler v. Gilette, 19 N. Y. S. C. (12 Hun), 280 (1877).

acceptance is not a departure from the tenor of the bill. It merely fixes a place of payment for the mutual convenience of the acceptors and the holder, and can work no possible injury to the drawer or indorsers, as it will not affect the time for the presentment of the bill to, or for the service of notice of non-payment on the parties entitled to such notice."[1] And it has been said that even if the bill were payable at a particular store, counting house, or office in the city, it would not be a material alteration to name in the acceptance another place in the same city.[2]

§ 1381. But if the drawee were to accept a bill so as to make it payable at another city or town, it would be a qualified acceptance, and the holder by taking it would discharge the drawer and indorsers.[3] It was so held in New York, where a bill addressed to "E. C. H., of New York," was "accepted payable at American Exchange Bank, Clayville Mills," which was in another county;[4] and so where a bill addressed to A. Y. & Co., at Coburg, Upper Canada, was accepted "Payable at the Bank of Upper Canada, Port Hope."[5]

§ 1382. In Kentucky, it has been held, that where one indorses a bill for accommodation of the drawee, it bearing at the time the drawee's name written across its face, and leaves it in the drawee's hands to be used by him to raise money, he thereby confers authority on him to write the acceptance above his signature, and designate therein a place of payment. And the court—basing its decision also upon the ground that the acceptance being in blank, the parties to the bill had afforded an opportunity for it to be filled up in a manner different from their agreement, would be bound to

[1] Niagara District Bank v. Fairman, *supra*, E. D. Smith, J.

[2] Troy City Bank v. Lauman, *supra*, Strong, J.

[3] Rowe v. Young, 2 B. & B. 165 (6 E. C. L. R.); Redfield & Bigelow's Lead. Cas. 329.

[4] Walker v. Bank of the State of N. Y. 13 Barb. 637 (1852).

[5] Niagara District Bank v. Fairman, 31 Barb. 404 (1860); see Todd v. Bank of Ky. 3 Bush (Ky.), 645, *infra*.

a *bona fide* holder without notice—sustained action by the holder against all the parties thereto.[1] In a subsequent case this view was confirmed by the court, not however without indications of reluctant acquiescence in it.[2] And indeed it does not seem to us sustainable upon reason or authority. The mere name of the drawee written across the bill does not signify an inchoate, skeleton undertaking, like that of an indorser in blank; or if a note is blank in respect to amount, time, or place of payment, it constitutes a full and complete acceptance in itself; and although it may be readily varied by additions, without imparting a suspicious appearance to the bill, that is a consequence of the nature of the engagement, and not of the carelessness or confidence of the acceptor. Therefore if it be varied, an alteration is made, and the prior parties are discharged.

§ 1383. *Memorandum of place of payment.*—Whether a memorandum of the place of payment is to be considered as a part of the contract, or merely as a direction where payment will be made, has been questioned; but it seems now settled that it enters into the contract and is a material alteration.

In Bank of America v. Woodworth, 18 Johns. 315, it ap-

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[1] Rogers v. Posters, 1 Mete. (Ky.) 645 (1858).

[2] Todd v. Bank of Ky. 3 Bush (Ky.), 626 (1868). In this case the drawee of the bill wrote over his acceptance, "accepted payable at the Northern Bank, Lexington." *Held*, that the indorser was not discharged, Williams, J., saying: "Although we might be inclined to deny this implied power in the drawee as the better opinion, if this question was now for the first time before this court, yet, in the face of an express decision of this tribunal, which has remained for ten years unaltered by legislative action or judicial construction, and when hundreds of thousands of dollars of this class of paper have been taken, and are perhaps now held on its faith, and regarding this rule, since the adoption of it by this court, as impliedly entering into all such contracts, we do not deem it of sufficient importance to overrule it, and thus unsettle a recognized rule of contracts, and perhaps jeopardize a large amount of such paper. Besides, there is much reason, when the paper is for the accommodation of the drawers and acceptor, as in this instance, to infer, from the transaction and nature of the paper, an implied authority in those for whose use it is made to appoint the place of payment, unless one has been already expressly designated in the bill, as this would more generally make the paper answer the purposes of the beneficiaries and objects of its creation."

peared that an accommodation note had been made, dated and indorsed in blank at Albany, where the parties resided, and that the maker, without the indorser's knowledge or consent, wrote in the margin, "payable at the Bank of America," *i. e.*, in New York city. The Supreme Court held the alteration immaterial, on the ground that an indorser in blank leaves the place of payment, when none is designated, to the subsequent discretion of the maker, except only when he appoints one in bad faith, or at an unreasonable distance.

But this decision was overruled on appeal (Woodworth v. Bank of America, 19 Johns. 391), the court deciding that a written instrument might be varied by a memorandum in the margin, and that the terms of such memorandum had the same effect as if contained in the body of the instrument,[1] and that this was a material alteration, because "it subjected the indorser to new and unexpected liabilities. By the note, as originally drawn, he bound himself to pay in the event of non-payment on a demand being made of the maker personally, or at his residence; by the addition of the memorandum, he is made liable upon a demand of payment at New York, which, but for that memorandum would have been perfectly nugatory. It rendered valid a notice of non-payment, which was received one or two days later than that which he contemplated at the time of his indorsement, a circumstance by which he does not indeed appear to have been injured, but which certainly increased his risks, and lessened his prospects of indemnity."[2]

§ 1384. *Alteration in amount of principal and interest.* —In the *fourth* place, as to the amount of principal for which the bill or note is executed, any change thereof is a material alteration, whether it be increased[3] or lessened;[4] as

[1] Starr v. Metcalf, 4 Camp. 217; Trecothick v. Edwin, 1 Stark. 469; Platt v. Smith, 14 Johns. 368; Jones v. Fales, 4 Mass. 244.

[2] See also Dewey v. Reed, 40 Barb. 17; and see *contra*, American National Bank v. Bangs, 42 Mo. 454; *ante*, § 1379, p. 356, note 1.

[3] Bank of Commerce v. Union Bank, 3 Coms. 230; Goodman v. Eastman, 4 N. H. 455.

[4] Stevens v. Graham, 7 S. & R. 505; Leith v. Elphiston (Scotch case), Thomson on Bills (Wilson's ed.), 111; Hewins v. Cargill, 67 Me. 554.

where, for instance, the amount is changed from $500 to $400,[1] for it is a palpable variance of the instrument's legal effect in its most vital part. Indeed, an alteration to a larger amount is a forgery; and so also of a smaller amount, if with fraudulent intent.

It has been held that where the principal altered a note so that its amount was lessened, and then delivered it to the payee, the surety was not discharged.[2] Certainly the identity of the contract was destroyed, and it is difficult to reconcile this case with the principles and authorities already stated. Doubtless, the idea that it was a release, and therefore a benefit to the surety, *pro tanto*, had a weighty influence with the court; but the law denominates any change in the legal effect of a contract an alteration, and its policy is to tolerate no tampering with written instruments.

§ 1385. In the *fifth* place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the percentage of interest, is of the same character as if it changed the principal.[3] Where the words "with lawful interest" were written on the corner of the note;[4] where "with interest from date" were incorporated in it;[5] and where "with interest" were written by the maker after it had been indorsed, but before delivery to the payee, it was alike held to be material, and to avoid the note as against non-consenting parties;[6] where "with interest payable semi-annually" were inserted before delivery to payee;[7] and where they were inserted afterward,[8] the surety was discharged; and where "with interest" was added, but without

[1] Hewins v. Cargill, 67 Me. 554.

[2] Ogle v. Graham, 2 Penn. 132.

[3] Schnewind v. Hacket, 54 Ind. 248; Harsh v. Klepper, 28 Ohio St. 200; see *ante*, § 1375.

[4] Warrington v. Early, 2 El. & B. 763; see also Sutton v. Toomer, 7 B. & C. 416.

[5] Brown v. Jones, 3 Port. (Ala.) 420.

[6] Waterman v. Vose, 43 Me. 504; see also McGrath v. Clark, 56 N. Y. 36.

[7] Neff v. Horner, 63 Penn. St. 327.

[8] Dewey v. Reed, 40 Barb. 16; Glover v. Robbins, 49 Ala. 219.

fraudulent intent,[1] and "interest to be paid annually."[2] So adding "eight per cent. interest;"[3] or "bearing ten per cent. interest from maturity."[4] A change of percentage is of like effect. Thus, where "nine per cent." was added to the words of a note "on demand and interest;"[5] and where twelve per cent. was changed to ten.[6]

So interlining the word "paid" before "annually" in the expression: "the above to be at ten per cent. annually."[7]

§ 1386. *Alteration in medium of payment.*—In the *sixth* place, as to the medium of payment, a change of the kind of currency, as by the addition of the words "in specie" to a bond after the sum;[8] or the word "gold" after the term "dollars" in a note;[9] or of the denomination, as "from pounds into dollars; from sterling pounds into current pounds,"[10] even though it could do no possible injury, would avoid the instrument, and there might be cases in which positive or possible injury would result. In a recent case before the U. S. Supreme Court, the words in an order which made it payable "in drafts to the order of H. G. A." were erased with a pen, and "in current funds," inserted in their stead; and the paper was held avoided thereby.[11] So, if the instrument be payable in goods, on the same principle, if the style or character of the goods were changed, it would be vitiated. It was so held where a note was payable "in merchantable meat stock," and the word "young" was interpolated after merchantable;[12] so adding "good hard" before "wood;"[13] so writing "good" before "merchantable wool."[14]

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[1] Fay v. Smith, 1 Allen, 477; Draper v. Wood, 112 Mass 315.
[2] Boalt v. Brown, 13 Ohio N. S. 364. [3] Hart v. Clouser, 30 Ind. 210.
[4] Lee v. Starbird, 55 Me. 491; see also Kilkelly v. Martin, 34 Wis. 525.
[5] Ivory v. Michael, 33 Miss. 398.
[6] Whitmer v. Frye, 10 Mo. 348 (a bond).
[7] Patterson v. McNeely, 16 Ohio St. 348.
[8] Darwin v. Rippey, 63 N. C. 318. [9] Bogarth v. Breedlove, 39 Tex. 561.
[10] Stevens v. Graham, 7 S. & R. 505.
[11] Angle v. N. W. &c. Ins. Co. 92 U. S. (2 Otto), 330.
[12] Martendale v. Follett, 1 N. H. 95. [13] Schwalm v. McIntyre, 17 Wis. 232.
[14] State v. Cilley, quoted in 1 N. H. 97.

SECTION III.

ALTERATIONS IN RESPECT TO THE PARTIES TO THE INSTRUMENT.

§ 1387. In the *seventh* place, as to the PARTIES to a bill or note, any change in the personality, number, or relations of the parties, is, as a general rule, a material alteration. Thus, where C., member of the firm of C. & Co., obtained an accommodation indorsement to his individual note, and then added "& Co." to his signature, thus making it his firm's note, it was held a material alteration.[1] When there are several makers or cosureties, the addition of another maker[2] or cosurety[3] constitutes a material alteration; for the addition of another maker destroys the integrity of the original contract; and the addition of another cosurety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others.[4] And the erasure of the name of one of two drawers or makers,[5] or payees,[6] who have indorsed the paper, or of one of several cosureties,[7] is likewise a material alteration. So the substitution of one drawer or drawee, or maker or comaker for another, is of

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[1] Haskell v. Champion, 30 Miss. 136.

[2] Hamilton v. Hooper, 46 Iowa, 516; Dickerman v. Miner, 43 Iowa, 508; Wallace v. Jewell, 21 Ohio N. S. 163; Hall v. McHenry, 19 Iowa, 521; Gardner v. Welsh, 5 El. & B. 82; overruling Catton v. Simpson, 8 Ad. & El. 136; see Gould v. Combs, 1 C. B. 543; 2 Parsons N. & B. 556, 557. But the additional maker is himself bound. Hamilton v. Hooper, 46 Iowa, 516; Dickerman v. Miner, 43 Iowa, 508.

[3] McVean v. Scott, 46 Barb. 379; overruled in Card v. Miller, 8 N. Y. S. C. (1 Hun), 504.

[4] In Monson v. Drakeley, 40 Conn. 552 (1873), where after delivery a party signed a joint and several note of a maker and two sureties as surety, no question of alteration was raised. The court held that he would not, unless in pursuance of arrangement at time of execution or delivery, become a joint promisor or maker, and that the subsequent undertaking was independent of and collateral to, the original; but the surety so signing was bound for contribution to the original sureties.

[5] Mason v. Bradley, 11 M. & W. 590; Gillett v. Sweat, 1 Gilm. 475; Callandar v. Kirkpatrick (Scotch case), Thomson on Bills (Wilson's ed.), 112.

[6] Cumberland Bank v. Hall, 1 Hals. 215.

[7] McCramer v. Thompson, 21 Iowa, 244; Hall v. McHenry 19 Id. 521.

like effect.[1] But it has been held, that where A. signed as principal and B. as surety, the cutting off the memorandum of suretyship from B.'s name was no material alteration, because as such it did not vary the meaning, nature, or subject-matter of the contract, B. being liable any way.[2]

§ 1388. Whether or not, when there is only one maker, the addition of another is an alteration which discharges him, is a question upon which the authorities are divided. In New York, where a note was offered in part payment of a purchase, and the seller refused to take it unless the buyer added his name under the maker's, such a signature and transfer was held to make the signer jointly and severally liable with the maker to the holder of the note, and an action was allowed against both as joint makers.[3] So where holders, in order to get a note discounted as makers, signed their names as makers, and afterward paid the note, it was held they had lost no rights, and could sell or transfer it.[4] But in a subsequent case, where the payee wrote his name under the maker's, adding to it the word "security," it was held a material alteration.[5] There are other cases in the same State, in which it is held that the addition of another name as maker, where there was but one, is not a material alteration, the additional maker being regarded as a guarantor.[6] And in the latest case it was held that such party was bound as a several maker.[7] In Scotland, it has been decided, in opposition to the English authorities, that where a new acceptor had been added to the address of the bill, and had accepted without the drawer's knowledge, after delivery of

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[1] Davis v. Coleman, 7 Ired. 424; Mahaiwe Bank v. Douglas, 31 Conn. 170; State v. Polk, 7 Blackf. 27; Richmond Mfg. Co. v. Davis, Id. 412; Smith v. Weld, 2 Barr, 54; Fleming v. Leiper, Thomson on Bills, 112.

[2] Vance v. Collins, 6 Cal. 530; but *quære?*

[3] Partridge v. Colby, 19 Barb. 248; see also McVean v. Scott, 46 Barb. 379.

[4] Muir v. Demaree, 12 Wend. 468. [5] Chappell v. Spencer, 23 Barb. 584.

[6] Brownell v. Winnie, 29 N. Y. 400; McCaughey v. Smith, 27 N. Y. 39, Balcom, J., dissenting.

[7] Card v. Miller, 1 Hun, 504 (1874); 8 N. Y. S. C. R. overruling Chappell v. Spencer and McVean v. Scott.

the bill to the other acceptor, for whose accommodation it was drawn, it was not a material alteration. "But," says Parsons, commenting on this decision, "we think the wiser rule is that which looks first to the integrity of the instrument, and secures that, though there be no actual injury nor purpose of fraud." [1]

§ 1389. The preservation of the integrity of the instrument is certainly a matter of prime importance, and where there are several makers, the addition of another would *prima facie* operate as a material alteration. Even if it were explained that the third was added as a surety, the difficulty would not seem to be entirely gotten over. If one of the original makers signed for accommodation, his apparent rights of contribution would be changed, and two parties, instead of one, would have to be resorted to. And if the original makers owed the debt, the third, by adding his name, confuses the evidences of it, and changes the form of their obligation. Still it may be urged with great force that the chance of damage is so remote, and the hardship of avoiding the instrument so great, that it should be regarded as an immaterial alteration. Where there is but one maker to a note, and another is added, these views apply with enhanced emphasis. The addition does not vary the original maker's liabilities in any respect. There could be no motive of fraud upon him or others to induce the addition. And while it would come within the letter of those declarations of courts that maintain anything which affects the integrity of the instrument, to be a material alteration, it does not seem to us to come within their spirit. And, on the whole, we think it may be regarded as an immaterial alteration.[2]

[1] 2 Parsons N. & B. 559.

[2] Miller v. Finley, 26 Mich. 249 (1872). In this case it appeared that a party added his signature as surety to a sole note. It was held an immaterial alteration. Campbell, J., said: "In the recent case of Aldous v. Cornwell, L. R. 3 Q. B. 573, Cotton v. Simpson is cited as authority on the point that an alteration will not vitiate, unless material; and the case of Gardner v. Walsh was referred to, merely to say that it only overruled the former case on the question whether such an alteration as that passed upon was material. Aldous v. Corn-

§ 1390. A change of the personality of the party is material. Thus adding or erasing "junior," in the signature,[1] or changing the christian name from "William" to "Thomas."[2]

Alterations in the name, number or relation of the acceptors or indorsers, stand on same footing as of other parties. Changing an indorser's christian name,[3] or adding,[4] or erasing[5] that of an acceptor.

The interlining of the words "jointly and severally," or "severally," or "or either of us" in a note joint and not several, would be a material alteration, as they would engraft upon the joint a several obligation.[6] But where a joint note has the effect to bind the parties jointly and severally, the insertion of those words would be immaterial, because merely expressing what was already implied.[7]

And the changing of a note from "I promise" to "We promise," is material, because it changes a joint and several note into one joint only.[8]

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well is somewhat pointed in condemning the early decisions which paid no attention to the materiality of alterations. And the doctrine that immaterial alterations should not be regarded, is too well based on good sense to be overthrown.

"The addition of a surety was not, in either of those cases, held to discharge a principal. It has always been competent for a person to become surety by signing the note of the principal, so as to become a joint and several maker. There is no rule which requires that a contract of suretyship must be cotemporaneous with the principal obligation. And unless the principal's liability is in some way affected by the addition, it cannot be material.

"It is very difficult to see how such a change can affect him in any but a mere technicality, which neither changes, increases, nor diminishes his liability." See also Gano v. Heath, 36 Mich. 441.

[1] Broughton v. Fuller, 9 Vt. 373.

[2] Macara v. Watson (Scotch case), Thomson on Bills, 112.

[3] Macara v. Watson, *supra*.

[4] Howe v. Purves (Scotch case), Thomson on Bills, 112.

[5] M'Ewen v. Gordon, Thomson on Bills, 112.

[6] Perring v. Hone, 2 Car. & P. 401; 4 Bing. 28. See Draper v. Wood, 112 Mass. 315.

[7] Gordon v. Sutherland, Thomson on Bills (Wilson's ed.), 113; Miller v. Reed, 27 Penn. St. 244.

[8] Humphreys v. Guillow, 13 N. H. 385; Hemmenway v. Stone, 7 Mass. 58; Clark v. Blackstock, Holt N. P. 474.

Where the name of a surety was erased by agreement between himself and the payee, it was held that the principal was not affected, as the payee had a right to release the surety if he chose to; and therefore it was no alteration,[1] but if the payee erased the word "surety" from a party's name without his assent, such party would be discharged.[2]

The striking out of the name of an indorsee on a special or full indorsement;[3] or changing a blank indorsement so as to read "pay to the order of E. S. at the rate of 25 fr. 75 c. per £1, '*utretro*," &c.; and writing the same on the face of the bill, materially alters the indorser's contract, and the latter also the acceptor's.[4]

Writing a waiver of demand, protest or notice over an indorsement would convert a contingent into an absolute liability, and therefore discharge the indorser.[5]

SECTION IV.

ALTERATIONS IN THE OPERATION OF THE INSTRUMENT.

§ 1391. In the *eighth* place, a change in the character or effect of the instrument, whether in respect to its obligation or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond, against which no plea of want of consideration can be made, and thus invests his contract with attributes which he declined to impart to it.[6] Consequently the note is avoided. So a bond is avoided by detaching the seal.[7]

So when a seal is added to the name of one of several comakers of a note, all are discharged, because the holder could not have the same recourse against the three which he held

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[1] Broughton v. West, 8 Ga. 248; Huntington v. Finch, 3 Ohio St. 445.
[2] Laub v. Paine, 46 Iowa, 551. [3] Grimes v. Piersol, 25 Ind. 246.
[4] Hirschfield v. Smith, Law Rep. 1 C. P. 340.
[5] Farmer v. Rand, 14 Me. 225.
[6] United States v. Linn, 1 How. 104; Marshall v. Gougler, 10 Serg. & R. 164.
[7] Piercy v. Piercy, 5 West Va. (Hagans), 199.

before; one would be estopped from denying a want of consideration which might inure to the benefit of all, and new relations and obligations would be created.[1]

§ 1392. Many questions have arisen as to the effect of adding to a note after its delivery the names of parties purporting to be witnesses to its execution. In States where a distinction is made between witnessed and unwitnessed notes, whether by the statute of limitations or otherwise, it would seem to us clear that the subscription of his name by the witness after the delivery would be a material alteration as to all parties not consenting, because it would change the legal effect of the instrument.[2] Thus, where an unattested note was barred by six years, and one attested stood on the foot of a bond, not being barred until twenty, and ten years after its execution, being four after the bar had accrued, the attestation was added, it was held a material alteration, as "it at once infused life into an instrument which had lost all legal efficacy."[3]

So, too, we should say, that if the payee should procure a person not present at the time of execution of the instrument to sign his name as a subscribing witness, it would be *prima facie* evidence of some fraudulent design, and would in itself constitute a material alteration.[4]

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[1] Biery v. Haines, 5 Whart. 563.

[2] Eddy v. Bond, 19 Me. 461.

[3] Brackett v. Mountfort, 11 Me. 115.

[4] Homer v. Wallis, 11 Mass. 309; see 2 Parsons N. & B. 555. In Adams v. Frye, 3 Met. 107, where the obligee of a bond procured a person not present nor authorized to attest it to sign it as a witness, it was held material. Dewey, J., said: "By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness, and yet the attestation might be wholly unauthorized and fraudulent. It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication that the subsequent addition of the name of an attesting witness, without the privity or consent of the obligee, is not a material alteration of the

§ 1393. If, however, a party actually witnessed the execution of a bill or note, and afterward, by request of the holder, should, without others' consent, subscribe his name as witness, it has been held that it does not work a material alteration, as it can work no harm.[1] And the suggestion that the appearance of such attestation might weigh with the jury in a question as to the genuineness of the signature, has been thought of little force.[2]

But it is treading on dangerous, and at least doubtful, ground to countenance this doctrine. It is true that where proved to have been done honestly throughout, little, if any, harm could be wrought; but, if permitted at all, it is by no means clear that, by forging the names of promisors and of witnesses, the door might be opened for extensive frauds. Upon the minds of a jury, the more solemn the form of an instrument, the greater its weight. Indeed, every mark of authenticity must insensibly or otherwise have its effect upon all minds. Certainly a court should exact very rigid proof of perfect good faith; and we are sustained by high authority in the opinion which our mind has reached, that it would be better not to permit such liberties to be taken with the rights of others.[3] Where the name had been accidentally neglected, so that its addition was really in addition of an original understanding, it would be different.[4] And very slight circumstances might prove such understanding.

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instrument, and would, under no circumstances, affect its validity. But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration, like that which was made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed assent of the obligor, it should not operate to avoid the obligation. But, on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should loose wholly the right to enforce his original contract in a court of law."

[1] Rollins v. Barlett, 20 Me. 319; 2 Parsons N. & B. 555.

[2] 2 Parsons N. & B. 554.

[3] 2 Parsons N. & B. 556.

[4] Smith v. Dunham, 8 Pick. 256.

It has been held that where the payee of a note cut off the name of an attesting witness he cannot recover at law, because it might be that it would impede the proof of consideration should a defense be made; and that equity would not relieve him, as it presumes everything against a spoliator.[1] The converse doctrine would seem to us applicable when the name had been added.

§ 1394. It has been held that if a bill be expressed generally "for value received," and words are added describing such consideration as "for the good-will and lease in trade"[2] of a certain person, or "for a certain tract of land,"[3] it is materially altered and avoided. The reasons assigned are, *first*, that it makes the note a confession in evidence of a fact which might otherwise require extraneous proof; and *second*, that it puts the holder upon inquiry whether that consideration passed.[4] The first reason seems to us in itself sufficient. But the second is, at least, according to several cases, and as it seems to us upon principle, incorrect in its statement of fact. The statement of the specific consideration is an assurance of some consideration, and does not charge the holder with inquiring about it.[5]

§ 1395. The addition of the negotiable words, "or order," or "bearer," is not an alteration when they were intended to have been inserted, and were accidentally left out.[6] But where the effect of such addition is to impart negotiability to an instrument not designed to be negotiable, it is a most material alteration in the nature of the contract, and the bill or note is thereby avoided.[7] So the interlineation of "or bearer," in a negotiable note, payable to a certain person or

[1] Sharpe v. Bagwell, 1 Dev. Eq. 115.
[2] Knill v. Williams, 10 East, 413.
[3] Low v. Argrove, 30 Ga. 129.
[4] 2 Parsons N. & B. 562.
[5] Herich v. Merchants' Nat. Bank, 34 Ind. 380; Bank of Commerce v. Barrett, 38 Ga. 126; see § 797, vol. 1.
[6] Kershaw v. Cox, 3 Esp. 246; 10 East, 437; Byrom v. Thompson, 11 Ad. & El. 31. See Cariss v. Tattersall, 2 Man. & G. 890.
[7] Bruce v. Westcott, 3 Barb. 374; Johnson v. Bank U. S. 2 B. Mon. 310; Pepoon v. Stagg, 1 Nott & McC. 102; Edwards on Bills, 95; The State v. Stratton, 27 Iowa, 424.

order, is an alteration of it, because it materially changes the manner of its negotiability. It would not without the payee's indorsement be evidence of the amount paid to him upon being returned after payment; and it might possibly deprive the defendant of a set-off otherwise available.[1] The substitution of "or order" for "bearer" would be different, because it would only affect the transfer of title between holder and transferee.[2]

So the addition of the words, "without defalcation or set-off," where they have the effect they import, would constitute an alteration.[3]

§ 1396. In some cases, words on the back of a bill or note are not regarded as a part of it; and it has been held that the cancellation of an indorsement of part payment need not be explained unless called in question.[4] But still an indorsement on the back of the bill or note might be material as a part of it, as its construction is to be gathered from every source of information which an inspection of it supplies.[5] And it may be shown by evidence that an indorsement annexing a condition to the payment was on the instrument when delivered, in which case it would be deemed a material part of it.[6]

§ 1397. *Alteration by making or obliterating memoranda on bills and notes.*—An alteration of the legal import and operation of a bill or note may be effected as readily by making or obliterating material memorandum upon it, as by inserting or erasing provisions in the body of it. Thus, where the words, "with lawful interest" were written on the corner of a note after its execution, it was said in England, by the Court of Queen's Bench: "This forms part of the

[1] Booth v. Powers, 56 N. Y. 30; Scott v. Walker, Dudley (Ga.), 243; The State v. Stratton, 27 Iowa, 424.

[2] Flint v. Craig, 59 Barb. 330.

[3] Davis v. Carlisle, 6 Ala 707.

[4] Commonwealth v. Ward, 2 Mass. 397. See Warner v. Spencer, 7 J. J. Marsh. 340.

[5] See Muldrow v. Baldwell, 7 Mo. 587; 2 Parsons N. & B. 545; *ante*, §§ 149 *et seq.* vol. 1.

[6] Blake v. Coleman, 22 Wis. 415.

contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of this note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded."[1] So, where the maker of a note payable generally wrote on the margin, "payable at Bank of North America," it was held vitiated as to the indorser.[2]

Cutting off or obliterating a material memorandum which had the effect to make a note written on demand payable on time;[3] or which annexed a condition to the payment of the note;[4] or provided for a delay of collection until a certain person should take it up, the maker having paid it;[5] or which made the note payable out of the profits of a certain business.[6]

SECTION V.

IMMATERIAL AND AUTHORIZED CHANGES OF THE INSTRUMENT.

§ 1398. Not every change in a bill or note amounts to an alteration. If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words which the law would imply, or by striking out words of no legal significance. Thus, writing out the name of the bank after the name of the signature "cashier," which was intended to bind the bank, is merely expressing more clearly the legal effect of the signature, and is not an alteration.[7] So the in-

[1] Warrington v. Early, 2 El. & Bl. 763. See also Benedict v. Cowden, 49 N. Y. 396 (1872); *ante*, §§ 149 *et seq.* vol. 1.

[2] Woodworth v. Bank of America, 19 Johns. 381, overruling 18 Johns. 319, 391. See *ante*, § 1367.

[3] Wheelock v. Freeman, 13 Pick. 165.

[4] Wait v. Pomeroy, 20 Mich. 425. But query, if there was no disfigurement. See *post*. §§ 1405, 1407 *et seq.*

[5] Johnson v. Heagan, 23 Me. 329.

[6] Benedict v. Cowden, 49 N. Y. 396.

[7] Bank of Genesee v. Patchin Bank, 3 Kern. 309; Folger v. Chase, 18 Pick. 63.

sertion of a dollar mark before the numerals expressing the amount in dollars;[1] or changing the marginal figures so as to conform them to the written amount;[2] or the addition in full of the christian names of the drawers whose surnames had been affixed before the acceptance;[3] the interlineation of the surname of the payee, after delivery;[4] the running of a pen through the words "Providence Steam-Pipe Co.," which was one name under which a firm did business, and writing over it their style in the copartners' names,[5] were likewise adjudged immaterial. So also where a bill was addressed to a firm by the style of "A., B. & Co.," and on being accepted by them in the name of "A. & B.," and the address was changed to conform to the acceptance, there being no question as to the identical firm intended, and the acceptors being liable either way.[6]

So erasing "R.," where the payee's name was written "B. R. C.," instead of "B. C.," as intended,[7] and correcting "Franklin E.," so as to read "Francis."[8]

And in no case is a change in the phraseology of the instrument material when it does not essentially change its legal effect.[9]

§ 1399. Immaterial memoranda on the margin or other portions of the bill or note stand on the same footing as immaterial insertions incorporated in it. If they be merely explanatory of some circumstance connected with the transaction, they are immaterial. Thus, where a drawer, who held a bill indorsed in blank by the payees, wrote under his signature: "Left with Mr. B. (the plaintiff) as collateral," it was held immaterial.[10] So where a party's residence was noted on the instrument after his name.[11] So an indication,

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[1] Houghton v. Francis, 29 Ill. 244.

[2] Smith v. Smith, 1 R. I. 398. See *ante*, Chap. III, § 86, vol. 1, note 6.

[3] Blair v. Bank of Tennessee, 11 Humph. 84.

[4] Manchet v. Cason, 1 Brev. 307.

[5] Arnold v. Jones, 2 R. I. 345.

[6] Farquhar v. Southey, Moo. & M. 14.

[7] Cole v. Hills, 44 N. H. 227.

[8] Desby v. Thrall, 44 Vt. 414.

[9] Holland v. Hatch, 15 Ohio St. 464.

[10] Bachellor v. Priest, 12 Pick. 399; Thomson on Bills, 113.

[11] Struthers v. Kendall, 5 Wright, 214.

for the convenience of the holder, where he would find his money when due.[1] So, where several makers of a note had appended to their signatures the words "as Trustees of the First Universalist Society," which appendix was torn off, it was held immaterial, as the note was the personal undertaking of the signers, and so remained unchanged in its effect.[2] The figures denoting the number in a particular series to which the instrument belongs is no part, and its alteration or erasure is immaterial.[3]

§ 1400. So there are some changes of a purely immaterial character, which do not change the effect or impair the identity of the instrument, and therefore are not alterations. Thus, retracing a faded name in clear ink;[4] or writing over in ink a word written in pencil;[5] or correcting a misspelling.[6] And where the number of a negotiable bond was changed, but it did not appear that the numbering was required by statute, nor in any way affected the holder's rights, it was held immaterial.[7] Where the consideration of a note was gold, and the payee inserted "paid in gold, gold having been the consideration," it was held immaterial to the maker, and also as to the surety, if he knew that the consideration was gold when he signed.[8]

§ 1401. *Changes by express or implied consent.*—It is quite obvious that where all the parties to a bill or note expressly agree to a change in any of its terms that they cannot complain of such change as an alteration. They have as much right to change as to make a contract. And where all do not consent, those consenting are bound, while the rest are discharged.[9]

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[1] Walter v. Cubley, 2 Cr. & M. 151.

[2] Burlingame v. Brewster, 79 Ill. 515.

[3] City of Elizabeth v. Force, 29 N. J. (Eq.) 591, overruling s. c. 28 N. J. (Eq.) 587; Commonwealth v. Industrial Savings Bank, 98 Mass. 12; Berdsell v. Russell, 29 N. Y. 220. See § 1499*a*.

[4] Dunn v. Clements, 7 Jones Law, 58.

[5] Reed v. Roark, 14 Tex. 329.

[6] Leonard v. Wilson, 2 Cromp. & M. 589.

[7] Commonwealth v. Emigrants' Bank, 98 Mass. 12.

[8] Hanson v. Crawley, 41 Ga. 303.

[9] Grimstead v. Briggs, 4 Iowa, 559; Wilson v. Jamieson, 7 Barr, 126.

Consent may be given before the change is made, or it may be given afterward by ratification.[1] It may be express, or it may be implied from custom,[2] or from the acts of the parties.[3]

In all cases where a change has been made, it will be a question for the court to determine whether or not it amounts to an alteration;[4] but the question whether or not the parties affected consented to it, is solely with the jury.[5]

If a note be altered by one signer without the consent of the other, and be sued upon as their joint note, the plaintiff may recover against the signer who made the alteration, but the other will be entitled to his costs.[6] Where two of three joint makers of a note consented to its alteration, it has been held that the holder can recover against them, provided he had no knowledge that the third maker had not consented.[7]

Under the English stamp acts there are a number of decisions to the effect that no change can be made after issue, even by consent of all parties.[8] As soon as the instrument is issued the stamp has filled its function. Any change afterward is virtually a new contract, requiring a new stamp.

§ 1402. Consent might be inferred to the insertion of negotiable words where the party indorsed the note as if it were negotiable,[9] so also from a subsequent acknowledgment of validity by payment of interest, consent would be implied.[10] So a promise to pay after full knowledge of alteration, and an offer to give security for payment, would be competent evidence of consent.[11]

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[1] National State Bank v. Rising, 11 N. Y. S. C. (4 Hun), 793; Cariss v. Tattersall, 2 Man. & G. 890; Morrison v. Smith, 13 Mo. 234.

[2] Woodworth v. Bank of America, 19 Johns. 391.

[3] Clute v. Small, 17 Wend. 238; Bowers v. Jewell, 2 N. H. 543.

[4] Stevens v. Graham, 7 S. & R. 505; Bowers v. Jewell, 2 N. H. 543; Jones v. Ireland, 4 Iowa, 63.

[5] Stout v. Cloud, 5 Lit. 205; Stahl v. Berger, 10 Serg. & R. 170.

[6] Broughton v. Fuller, 9 Vt. 373; Wills v. Wilson, 3 Oregon, 308.

[7] Myers v. Nell, 84 Penn. St. 369.

[8] Bowman v. Nichol, 5 T. R. 547; Bathe v. Taylor, 15 East, 412; Downes v. Richardson, 5 B. & Ald. 674.

[9] Kershaw v. Cox, 3 Esp. 246.

[10] Cariss v. Tattersall, 2 Man. & G. 890.

[11] Humphreys v. Guillow, 13 N. H. 385.

So the supplying of an omission, such as stating on whose account the bill was drawn, there being no dispute as to the fact.[1]

Where the last indorser of an accommodation bill made a memorandum at the foot directing its proceeds to be credited to the drawer, it was held no part of the bill, and its obliteration of no consequence.[2]

§ 1403. *Changes to correct mistakes, supply omissions, and effectuate parties, intentions.*—In like manner, where the change is made by implied consent, as, for instance, where it is done in order to correct a mistake in which all the parties concurred, or to supply an accidental omission, and thus to effectuate the intentions of all, it does not constitute a legal alteration. For although it may sometimes vary the apparent legal effect of the instrument, it does not change the effect which they intended to give it; but really effectuates their design by giving expression to it, and prevents it from being thwarted.[3] Thus, where 1822 was inserted by mistake for 1823, and the agent of the drawer, and acceptor to whom the bill had been given for delivery to the indorsee, rectified the mistake, it was held not an alteration.[4] And so where 1868 was changed to 1869, the latter having been intended.[5]

§ 1404. So, where the drawer intended to make the bill negotiable, and indorsed it over, but omitted the words, "or order," their subsequent insertion merely supplied his omission, and it was held was not an alteration.[6] So, where the

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[1] Commercial Bank v. Paton, Thomson on Bills, 113.

[2] Hubbard v. Williamson, 5 Ired. 397.

[3] McRaven v. Crisler, 53 Miss. 542.

[4] Brutt v. Piccard, R. & M. 273.

[5] Duker v. Franz, 7 Bush (Ky.), 273. But see Bowers v. Jewell, 2 N. H. 543. In this case it appeared that a note was actually executed in 1819, but dated 1809, and subsequently altered to 1819. There was no express evidence of the consent of the maker, and judgment for the plaintiff was reversed by the Superior Court, for evidence to be taken as to whether or not the alteration, which it deemed material, was fraudulent also.

[6] Kershaw v. Cox, 3 Esp. 246; 10 East, 437; Jacobs v. Hart, 2 Stark. 45; Clute v. Small, 17 Wend. 242.

holder of a bill payable "twenty-four after date," inserted "months;"[1] and where in a bill payable "in the of our Lord," the word "year" was inserted,[2] it was held likewise. And where a note was intended to read "eight hundred dollars," and "hundred dollars" were omitted, they were properly supplied.[3] So, where "hundred" was inserted before "pounds" in a bond, having been intended.[4]

For like considerations, where the name of one of several payees was inserted by mistake, the indorsee of the other payees might prove the fact in a suit to recover against his indorsers, in order to show that such payee's indorsement was unnecessary to pass title to him.[5] And we should say that, as such payee's name was not intended to be there, its erasure would be authorized to correct the mistake.[6]

SECTION VI.

BONA FIDE HOLDER OF ALTERED BILL OR NOTE. WHERE PARTY AFFORDS OPPORTUNITY FOR ALTERATION HE IS BOUND.

§ 1405. There is a general principle which pervades the universal law merchant respecting alterations (which, when they are material, will, as we have seen, vitiate the bill or note even in the hands of a *bona fide* holder without notice); a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is, that when the drawer of the bill or the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice when the opportunity which he has afforded has been embraced, and the instrument filled up

[1] Connor v. Routh, 7 How. (Miss.) 176.
[2] Hunt v. Adams, 6 Mass. 519.
[3] Boyd v. Brotherson, 10 Wend. 93.
[4] Waugh v. Russell, 1 C. Marsh. 214; 5 Taunt. 707.
[5] Pease v. Dwight, 6 How. 190.
[6] Thomson on Bills (Wilson's ed.), 114.

with a larger amount or different terms than those which it bore at the time he signed it.[1] The true principle applicable to such cases is that the party who puts his paper in circulation, invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none.[2] "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease, and without ready detection."[3] The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration.[4]

§ 1406. Thus, where the maker of a note left a blank between the amount "one hundred," and the word "dollars" following, and "fifty" was inserted between them in the same handwriting, it was held that the holder without notice could recover the whole amount.[5] So, where the note was expressed "with interest monthly at the rate of — per cent. per annum, per month, until final payment," and the word "five" was inserted so as to put the blank rate of interest at five per cent.;[6] and the like decision has been rendered in Iowa.[7] But, in a similar case, where a blank was left after the words, "value received with interest at —,"

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[1] Young v. Grote, 4 Bing. 253; Isnard v. Towes, 10 La. Ann. 103; Garrard v. Hadden, 67 Penn. St. 82; Thomson on Bills (Wilson's ed.), 109; also 42, 43; see *post*, Chapter XLIX, on Checks, Section XIV.

[2] Van Duzer v. Howe, 21 N. Y. 538 (1860). See Chapter XXVI, Sec. III, vol. 1, §§ 843 *et seq.*, and Chapter XLIII, Sec. VI, §§ 1405 *et seq.*

[3] Zimmerman v. Rote, 75 Penn. St. 188; Brown v. Reed, 79 Penn. St. 370.

[4] Approved in Blakey v. Johnson, 13 Bush (Ky.), 204 (1877).

[5] Garrard v. Haddan, 67 Penn. St. 82. To like effect Yocum v. Smith, 63 Ill. 321.

[6] Visscher v. Webster, 8 Cal. 109; see also 6 Cal. 577.

[7] Rainbolt v. Eddy, 35 Iowa, 440 (1872).

and "ten per cent." was inserted, this doctrine was denied.[1] Where after the word "at" a blank was left, and it was filled, so that the note was made payable at an unauthorized place, it was held that the word "at" implied that the blank space which succeeded it might be filled before the note should be delivered, with a designated place of payment, and that of the holder filled in a place of payment, it would not discharge the maker,[2] nor an indorser.[3] And to the like effect are cases elsewhere cited.[4]

And in like manner, where the note was written partly in pencil and partly in ink, and the provision in pencil annexing the condition: "This note is not to be paid until fourteen mills are sold," the rubbing out of the condition would not debar a *bona fide* holder without notice from recovering, the maker having been guilty of gross negligence in so making the note as to be easily altered without mutilation.[5] So where the words "without interest" were interlined in pencil, and afterward erased, the party was held guilty of negligence, and the *bona fide* holder without notice protested.[6]

§ 1407. *The addition or subtraction of a memorandum on* the bill or note is, as we have already seen, as much an alteration as if the same act had been committed in respect to its incorporated terms.[7] But if the memorandum were so written upon the margin of the instrument that it could be readily separated from it without giving it a mutilated appearance, a *bona fide* holder taking it without notice, we should consider unaffected by its being so severed and destroyed.[8] If the memorandum were originally made upon a

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[1] Holmes v. Trumper, 22 Mich. 427. See also Greenfield Savings Bank v. Stowell, 123 Mass. 196; Washington Sav. Bank v. Ekey, 51 Mo. 273.

[2] Redlich v. Doll, 54 N. Y. 237.

[3] Kitchen v. Place, 41 Barb. 465; see McGrath v. Clark, 56 N. Y. 36.

[4] Vol. 1, § 144.

[5] Harvey v. Smith, 55 Ill. 224; see also Elliott v. Levings, 55 Ill. 214.

[6] Seibel v. Vaughan, 69 Ill. 257.

[7] *Ante*, § 1397.

[8] *Ante*, § 1406; Phelan v. Moss, 17 P. F. Smith, 59; Garrard v. Haddan, Id. 82; Cornell v. Nebeker, 5 Ind. 428; Zimmerman v. Rote, 75 Penn. St. 188.

separate paper, there can be no doubt that, although a contract binding between the parties, it would be of no effect against a third party without notice;[1] and if the party who executes a negotiable instrument chooses to restrict its effect by a separable memorandum, instead of writing the entire contract in the body of the instrument, he should not be protected against a fraud of which he has laid the foundation. The holder should be protected, upon the principle that where one of two innocent persons must suffer, the loss should fall on the one who has furnished the opportunity. The case is analogous to those in which blanks have been filled with excessive amounts. The promissor should be held bound when he has left his contract in a form to be mutilated by the cutting away of a part, as well as where he has left room for an alteration to be engrafted upon it. But it has been held differently in Michigan,[2] and also in New York,[3] and some other States;[4] but it is observable that in the New York case the court says, in its opinion, that the

[1] 2 Parsons N. & B. 539.

[2] In Wait v. Pomeroy, 20 Mich. 425, it appeared that there was written under a promissory note for $200 this memorandum, "If the machine should not be delivered, this note not to be paid." which was cut off and destroyed, and the note, without it, passed to a *bona fide* holder without notice; the court held that he could not recover, and Campbell, C. J., concluded his opinion, saying: "There seems at first a plausibility in the argument that a party by signing a note with a separate memorandum beneath, puts it in the power of the holder to gain easier credit for the note than it would be likely to gain if altered in the body. But as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And practically it is a matter of every-day occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way. The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety except by looking to the character and responsibility of the persons from whom such paper is received, and who are always bound to respond for the consideration if it is forged. Little v. Derby, 7 Mich. 325. If a party makes a contract in such a manner as is authorized by law, he has a right to object to being bound to any other. A *bona fide* holder, before maturity, is allowed to receive the genuine contract, discharged from any equities attached to the contract itself, as between the original parties, but he cannot get a contract where none was made."

[3] Benedict v. Cowden, 49 N. Y. 396 (1872).

[4] Gerrish v. Glines, 56 N. H. 9; see Palmer v. Largent, 5 Neb. 223.

question, whether or not there was negligence on the part of the maker, and the effect thereof, was not raised in the court below, and could not then be considered. If there were a mere memorandum to the effect, "This note is given on condition," and there is nothing to show what the condition is, the severance has been held to be immaterial.[1]

§ 1407*a*. The authorities on this subject, as applicable to particular circumstances, are conflicting, as the text has already disclosed. Where blanks are left in the paper, they concur that their existence implies authority in the holder to fill them, and that therefore the *bona fide* holder may recover on the paper, although the blank be filled in excess of any real authority conferred. But when the paper is perfect in itself, and the parties are sought to be charged because of the fact that the words or figures have been so written that interlineations are practicable, without presenting a strange or suspicious appearance, and have been made so as to alter the purport of the instrument, a very nice and difficult question is presented. A recent Massachusetts case very forcibly presents the doctrine that the *bona fide* holder of perfected negotiable instruments, which have been altered by the insertion of words in the spaces left between the words and figures, cannot recover; and denies that the parties to such instruments are guilty of any such negligence as should render them liable when their undertakings have been altered by strangers.[2]

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[1] Palmer v. Largent, 5 Neb. 223; see *ante*, §§ 41, 51, 797.

[2] Greenfield Sav. Bank v. Stowell, 123 Mass. 203. In this case the cases on this subject were reviewed in an elaborate and able opinion, and the doctrine stated in the text was disapproved. In that case it appeared that George W. Bardwell obtained from the plaintiff a printed form of a note, wrote the figures "67" at the top of it, leaving a space of three-tenths of an inch between the "$" mark and these figures, and also wrote the words "sixty-seven" before the word "dollars," in the body of the note, leaving three inches of the blank space before the words sixty-seven unfilled. Having signed the note in this form, he presented the note to, and obtained the signatures of two others, as joint and several makers with himself, they having no knowledge or expectation that the note was to be altered or negotiated for a larger sum than sixty-seven dollars, and giving him no authority to alter or increase the amount of the note. Bard-

§ 1408. But if the alteration were made without any fault on the part of the maker, drawer or acceptor, neither will then be bound, although the alteration were so skillfully made as to escape notice upon careful observation. Thus, where a banker's check had been dexterously altered by a chemical process, the original sum being expunged, and a larger inserted, the banker was not allowed to recover of the drawer more than the sum for which the draft actually called when he drew it.[1] So where the payee of a note altered it from $500 so as to read $1,500, no blank space having been negligently left.[2] And clearly when the alteration is made in so clumsy or ineffectual a manner that it ought to excite suspicion and inquiry, the holder will not be protected, having only himself to blame if he takes it.[3] Actual notice is not in such cases required, constructive notice suffices, and if the holder chooses to receive the paper, with erasures or other marks of infirmity upon it, he takes it at his own risk.[4] It has been held that the question whether the alteration bears marks of suspicion is for the court, on inspection of the instrument.[5] Any addition to any instrument already complete is an undoubted forgery.[6]

§ 1409. In Scotland the doctrine of the text obtains, and there the acceptor and indorser were held bound upon a bill in which the sum had been altered from "eight" to "eighty-four" pounds; there being so much room for the alteration, that it was made without giving the bill a suspicious appearance. In another case in which two bills came under consid-

well, without the knowledge of the co-makers who signed for his accommodation, fraudulently inserted the figure "4" before the figures "67," and the words "four hundred and" before the words "sixty-seven," and negotiated the note to the plaintiff as a note for four hundred and sixty-seven dollars. It was held that the plaintiff could not recover against the accommodation makers.

[1] Hall v. Fuller, 5 Barn. & C. 750. [2] Trigg v. Taylor, 27 Mo. 245.

[3] Hall v. Fuller, 5 Barn. & C. 750; Garrard v. Haddan, 67 Penn. St. 82; Worrall v. Gheen, 3 Wright, 388; Thompson on Bills (Wilson's ed.), 43.

[4] Angle v. M. W. &c. Ins. Co. 92 U. S. (2 Otto), 342; see *ante*, §§ 788, 789.

[5] Paramore v. Lindsey, 63 Mo. 63.

[6] Ivory v. Michael, 33 Mo. 398; McGrath v. Clark, 56 N. Y. 36; see Vol. 1, § 142.

eration—one in which the words "four hundred and" had been added before "fifty-eight" without appearing suspicious; and the other in which an alteration had likewise been made in the sum, but so as to have a crowded appearance; it was held that the acceptors were bound upon the first bill to the full amount to a *bona fide* holder without notice; but upon the second, that the parties were discharged altogether.[1] A recent Pennsylvania case well illustrates the principles enunciated. The defendant signed an agreement constituting him an agent for the sale of a patented article, which agreement was so framed that a part of it could be cut off, leaving a perfect negotiable note. It was so cut without defendants knowledge, and transferred for value to the plaintiff. It was held that the defendant was not bound, as he had not signed a negotiable note, and was not guilty of negligence in the premises.[2]

SECTION VII.

THE EFFECT OF ALTERATION.

§ 1410. The effect of material alteration of a bill or note will be considered, (1) in respect to fraudulent alterations, and (2) in respect to alterations innocently made. The effect of immaterial changes, not amounting to alterations, will be separately considered.

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[1] Pagan v. Wylie; Graham v. Gillespie; see Thomson on Bills (Wilson's ed.), 42, and Ross on Bills, 104, 195.

[2] Brown v. Reed, 79 Penn. St. 370 (1875), Sharswood, J., distinguishes and explains Phelan v. Moss, Garrand v. Haddan, and Zimmerman v. Rote. The paper which was perverted into a note was as follows:

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North East, April 3d, 1872.

"Six months after date I promise to pay J. B. Smith or order Two Hundred and Fifty Dollars for value received, with legal interest, without defalcation or stay of execution. hearer, fifty dollars when I sell by worth of hay and harvest grinders appeal and also without

T. H. BROWN, Agent for Hay & Harvest Grinders.

*

The paper was divided by cutting through where the asterisks are placed, but when the paper was written the context was close and natural, with nothing to indicate that any portion was to be detached. The left-hand half was negotiated as a note, but was not recoverable upon as such by even a *bona fide* holder.

In the *first* place, as to fraudulent alteration, when a party to a bill or note fraudulently alters its legal effect, he not only destroys the instrument by thus destroying its legal identity, but he also extinguishes the debt for which it was given. And it cannot afterwards be made the basis of, or evidence for, a recovery in any form of action whatever;[1] though, of course, it might be admissible to defeat a claim on the ground of fraud, or convict a party of a crime.[2] It is necessary that the law should impose this forfeiture of the debt itself upon one who fraudulently tampers with the instrument which evidences or secures it; and it is done upon the principle that "no man should be permitted to take the chance of gain by the commission of a fraud, without running the risk of loss in the case of detection."[3]

Thus in Massachusetts, where a memorandum was written upon two notes, providing that they should be payable in a certain contingency in two years, and was cut off by the plaintiff, it was held presumptively fraudulent, and that he could not recover.[4]

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[1] Wheelock v. Freeman, 13 Pick. 165; Meyer v. Hunecke, 55 N. Y. 412; Booth v. Powers, 56 N. Y. 31; Newell v. Mayberry, 3 Leigh, 254; Smith v. Mace, 44 N. H. 553; Clute v. Small, 17 Wend. 238; Merrick v. Boury, 4 Ohio St. 70; Wallace v. Harmstad, 44 Penn. St. 492 (a deed); 2 Parsons N. & B. 572.

[2] Chitty on Bills (13 Am. ed.) [*191], 219.

[3] Newell v. Mayberry, 8 Leigh, 254; Vogle v. Ripper, 34 Ill. 107; Whitmer v. Frye, 10 Mo. 350.

[4] Wheelock v. Freeman, 13 Pick. 168, Shaw C. J.: "If the plaintiff claims upon the notes, he is not entitled to recover, because he has made a material alterations in the notes since they were signed. Master v. Miller, 4 T. R. 320. That it was fraudulent is a conclusion of law from the fact that it was done willfully, for his own benefit and to the injury of the defendant, by accelerating the payment. It has been made a question whether the alteration was material. This is easily tested by inquiring whether the notes would have the same legal effect and operation after the alteration as before. After the alteration they were payable on demand; before it, on time. The difference is apparent. And so the parties understood it. When written 'on demand,' the defendant refused to sign them, and only consented to do so after the qualifying memorandum was made. But there is no magic in the word memorandum. And it has often been decided that any words written on an instrument which qualify and restrain its operation, constitute a part of the contract. Jones v. Fales, 4 Mass. R. 245, where the words 'foreign bills,' written in the margin of the note, were held to

§ 1411. *In the next place, as to alterations innocently made.* —It is considered by a number of authorities that when the alteration is material, the instrument is *ipso facto* avoided, and the original consideration forfeited; no regard being paid to the inquiry whether or not the alteration was fraudulent as well as material; it being said in a case of this character in Vermont, by Pierpoint, J.: "The forfeiture of the debt is one of the penalties which the law imposes upon the party who alters or tampers with the written evidence which he holds of his claim."[1] On the other hand, in a number of English and American cases, it has been considered that a material alteration only avoided the instrument, and if it were given for a debt,[2] or in renewal of a bill or note,[3] the holder might still sue upon the original cause of action—no question of fraudulent intent being raised in the pleadings or appearing in the case. But the holder could not sue any party whose remedy, after making payment, would be impaired by the alteration.[4] If the alteration is material, all authorities agree that the instrument is avoided.[5] The alteration vitiates it regardless of intention.[6] In New York, the effect of material alteration innocently made has been said stated by Folger, J., as follows: "If the alteration was made without fraudulent intention, the payee may resort to the original indebtedness, if that was independent of the note, and has not been discharged by the execution of it, and

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be part of the contract; Springfield Bank v. Merrick, 14 Mass. R. 322; Homer v. Wallis, 11 Mass. R. 309; Heywood v. Perrin, 10 Pick. 228."

[1] Bigelow v. Stephens, 35 Vt. 525; Martendale v. Follett, 1 N. H. 99.

[2] Atkinson v. Hawden, 2 Ad. & E. 169 (29 E. C. L. R.) Bill altered in date from 30th to 28th of December. *Held*, drawer could recover original consideration of acceptor. Warren v. Layton, 3 Harring. 404; Clute v. Small, 17 Wend. 242.

[3] Sloman v. Cox, 1 C. M. & R. 471. Bill given in renewal altered in date from 20th to 24th of June, and it was held that there could be suit on original bill.

[4] Alderson v. Langdale, 3 Barn. & Ad. 660.

[5] Angle v. N. W. &c. Ins. Co. 92 U. S. (2 Otto), 312; Harsh v. Klepper, 20 Ohio St. 200; Booth v. Powers, 56 N. Y. 31.

[6] Evans v. Foreman, 60 Mo. 449.

pursues the maker upon that. But to have such resort, he must be able to produce and surrender the note." [1]

§ 1412. It is maintained by a number of authorities, that if a bill or note appear on its face,[2] or be shown by extraneous evidence to have been materially altered, there will be no presumption that such alteration was fraudulent, and that therefore, although the instrument be destroyed as the foundation of an action, the party who held it may recover upon the original consideration, or enforce any other security for the debt.[3] On the other hand, others maintain that if the alteration be material, it will be presumed to have been fraudulent also, and that until this presumption be rebutted by explanation there can be no recovery in any form of action whatever.[4] The latter doctrine seems correct. The party in default should bear the burden of explaining it, and of extricating himself. He must know the circumstances which induced the alteration, and to require the party wronged to go into his enemy's camp for testimony would be to facilitate the inventions of fraud.

§ 1413. When an instrument has been materially altered it cannot be sued upon in its altered form, nor read in evidence to support an action. But when the holder discharges the burden of proof upon him by showing that the material alteration was made by mistake and without fraudulent intent, the right of action upon the consideration for which it was given remains.[5] And there is authority to the effect that although the alteration be material and fraudulent—that since a bill or note suspends, and is not absolute

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[1] Booth v. Powers, 56 N. Y. 31; see also Clute v. Small, 17 Wend. 238; Meyer v. Huneke, 55 N. Y. 412.

[2] Gist v. Evans, 30 Ark. 286.

[3] Vogle v. Ripper, 34 Ill. 100. A note secured by mortgage was materially altered. *Held*, that a mortgage securing it might be enforced, the mortgagor not alleging fraud.

[4] Whitmer v. Frye, 10 Mo. 349, Scott, J.: "There is no question but that the alteration was a material one, and it is *prima facie* fraudulent." Wheelock v. Freeman, 13 Pick. 165; Robinson v. Reed, 46 Iowa, 221.

[5] Hunt v. Gray, 35 N. J. Law, 227; Matteson v. Ellsworth, 33 Wisc. 488.

payment of, the debt for which it is given—such alteration only extinguishes the security, and the original consideration remains.[1] But this is not, we think, sound doctrine. In Massachusetts, where P. the maker of a note for $500 got R. to indorse it for P.'s accommodation, and then by aid of chemicals raises it to $2,000, and got it discounted at bank; but before it fell due the fraud was discovered, the writing restored, and the note as for $500 protested, it was held that R. was not liable, the only note accepted by the bank, the plaintiff being due for $2,000, which note R. did not indorse.[2]

§ 1414. There may be many cases of innocent material alterations in which it would work injury, loss or inconvenience to confine the holder to a suit upon the original consideration. If the indorser were sued, he could not have the maker's note restored to him as a foundation for his action if it were utterly annihilated by the alteration. And the indorsee might have rendered such a consideration as could not be recovered back: for instance, professional services, labor, or another note. For these reasons it would seem just to allow a more specific remedy; and while we have seen no precedent which so decides, it has been suggested that a court of equity would, under its jurisdiction over mistakes, correct an alteration innocently and mistakenly made, and restore the instrument to its original form.[3] And there is no sufficient reason why the party should not himself be permitted to undo what he has mistakenly done, provided no other person has become so situated towards the instrument that it would operate prejudicially upon him.[4] The burden of proving innocence would be a sufficient safeguard to prior parties; and when innocence is clearly proven, and the *prima facie* presumption of guilt overthrown, it would seem too rigorous to inflict upon the innocent a penalty only deserved by the guilty.

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[1] Matteson v. Ellsworth, 33 Wisc. 488, *obiter*.

[2] Citizens Nat. Bank v. Richmond, 121 Mass. 110. See also Walpole v. Ellison, 4 Houston, 322.

[3] See Chadwick v. Eastman, 53 Me. 16. This seems to be hinted.

[4] 2 Parsons N. & B. 570.

§ 1415. This latter view was forcibly presented in Pennsylvania in a case where within an hour or two after the note was signed, the payee returned to the maker's office, where his clerk, at the payee's request, but without knowledge or consent of the indorser, inserted "with interest." The maker ratified the clerk's action. But subsequently the payee had the inserted words expunged, apparently with chemicals, and sued the indorser upon it in its original form. The latter claimed that the note had been avoided as to him by the alteration; but it was held, that no fraud having been intended, the plaintiff had a right to restore it to, and sue upon it, in its original form.[1] And in Massachusetts, where a special indorsement was erased by mistake, and no one could suffer from its restoration, the canceled words were allowed to be replaced, the court saying: "Justice requires and the law allows it to be done."[2] In a late Iowa case, where the payee of a note, being desirous of transferring it, but ignorant of the appropriate method, erased his own name and inserted that of the transferee, and subsequently, before delivery, restored it to its original form, and then indorsed it, the alteration was deemed immaterial, and an action by the indorsee against the maker sustained.[3] Where the alteration is fraudulent, there can not be any restoration.[4]

§ 1416. *Effect of immaterial change with fraudulent*

[1] Kountz v. Kennedy, 63 Penn. St. 187 (1870), Thompson, C. J., saying: "Now it seems to me, that, as the identity of the note remained, and there was nothing in it to enlarge the obligation of the indorser, and as what had been done was innocently but mistakenly done, and expunged for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this. I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded, as it manifestly was, to the indorser immaterial." Sharswood, J., dissented. See also Collins v. Makepiece, 13 Ind. 448.

[2] Nevins v. DeGrand, 15 Mass. 436.

[3] Horst v. Wagner, 43 Iowa, 373 (1876). See Ames v. Brown, 22 Minn. 257.

[4] Citizens National Bank v. Richmond, 121 Mass. 110.

intent.—It is said by some of the authorities, and by Greenleaf in his Treatise on Evidence, that if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[1] There are other cases in which this doctrine is laid down;[2] but in none of those quoted by the learned author, or which we have seen, did it appear that the alteration was immaterial, and was held to have vitiated the instrument by reason of the fraudulent intent. If the change destroys the identity of the instrument, it is material; but it has been well said, "an immaterial alteration may be treated as no alteration;"[3] and accordingly held that if the act itself is immaterial and can work no injury, it is irrelevant to inquire into the motives with which it was committed. Intent not manifested in a material respect is nugatory, and this we conceive to be the true doctrine.

SECTION VIII.

BURDEN OF PROOF OF ALTERATION.

§ 1417. Whether or not a negotiable instrument has been altered, may appear upon its face, or may be shown by the defendant to have been made so skillfully, or in such a manner, as not to be apparent to the observer. When an alteration is apparent on the face of the instrument, the question arises whether the burden of proof is upon the holder to show that it was made before, or cotemporaneously with its issue; or is upon the defendant to show that it was made after it was issued. It may seem harsh to the holder,

[1] Greenleaf on Evidence, vol. 1, 568.

[2] Lubbering v. Kohlbrecher, 22 Mo. 598; Turner v. Billagram, 2 Cal. 523.

[3] Moge v. Herndon, 30 Miss. 120.

and may frequently devolve loss upon an innocent party, to require him to explain an alteration which may have been made before he came into possession of the instrument, and with which he had no privity. But it would frequently be equally harsh to hold the defendant to the responsibility of showing not only that his contract has been altered, but in addition that the alteration was made after it left his hands.

The principle which prevails according to the current of English and American authorities has been well stated by Chief Justice Gibson, in a case where the words "payable at the Bank of Pittsburgh," written at the end of a note, were in a handwriting different from that of the defendant. He said: "Without a presumption to sustain him, the maker would in every case be defenseless. It may be said that the holder, with such a presumption against him, would also be defenseless. But it was his fault to take such a note. As notes and bills are intended for negotiation, and as payees do not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it branded with marks of suspicion, which would probably render it unfit for his purposes. The very fact that he received it is presumptive evidence that it was unaltered at the time; and, to say the least, his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it."[1]

§ 1418. The same rule has been applied where it appeared that "May 4th, 1837," had been altered to "April 4th;"[2] where "£40 17s. 6d." appeared to have been changed to "£49 17s. 6d.;"[3] where the words "second of exchange" were

[1] Simpson v. Stackhouse, 9 Barr, 186 (1848).

[2] Hill v. Barnes, 11 N. H. 395 (1840).

[3] Henman v. Dickinson, 5 Bing. 183 (15 E. C. L. R.) Best, C. J.

changed to "only of exchange;"[1] where the words "at his office in New York" were erased;[2] where "March 25th" was changed apparently to "March 30th,"[3] and "August 12th" to "August 13th;"[4] where the name of one of several promisors had been erased;[5] where the words "forty-five dollars and twenty-nine cents" had been erased, and "forty-seven dollars and seventy-nine cents" interlined;[6] where "one hundred" was substituted for "three hundred,"[7] where the words "if the same be a lien on the land bought" were interlined in an acceptance conditioned upon the satisfaction of a judgment, and were in ink of a different color from the rest of the bill, the same view was taken,[8] where the words "after due" in the printed form of a note, following the rate of interest, were erased;[9] so where the words "& Co." were inserted in a guaranty of payment by "George Winchester," in a different handwriting and a different colored ink from the body of the instrument.[10]

And the principle has been recognized or enforced in numerous other cases.[11] A different principle applies to

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[1] White v. Hass, 32 Ala. 430. [2] Fontaine v. Gunter, 31 Ala. 258.

[3] Heffner v. Wenrich, 32 Penn. St. 423.

[4] Kennedy v. Lancaster Co. Bank, 18 Penn. St. 347.

[5] Daniel v. Daniel, Dudley (Ga.), 239.

[6] Wheat v. Arnold, 36 Ga. 480. [7] Chism v. Toomer, 27 Ark. 109.

[8] McMicken v. Beauchamp, 2 La. O. S. 290 (1830).

[9] Willett v. Shepard, 32 Mich. 106.

[10] Wilde v. Armsby, 6 Cush. 314. In Massachusetts, it was held, in Simpson v. Davis, 119 Mass. 269, that in an action on a note in which the declaration alleges that the defendant made the note, and the answer denied this and alleged alteration, proof of defendant's signature was *prima facie* evidence that the whole body of the note was the act of the defendant, but the burden of proof was on the plaintiff to show that the note declared on was the note of the defendant.

[11] Runnion v. Crane, 4 Blackf. 466; Warren v. Layton, 3 Harr. 404; Walters v. Short, 5 Gilm. 252; Wheat v. Arnold, 36 Ga. 482; Piercy v. Piercy, 5 West Va. (Hagans), 199; Elbert v. McClelland, 8 Bush (Ky.), 577. In Greenleaf on Evidence, vol. 1, § 564, it is said: "Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be cotemporaneous with the execution of the instrument." But in note 1, page 605 to the same section, it is said: "An exception to this rule seems to be admitted in the case of negotiable paper." 2 Parsons N. & B. 575–577. *Contra: Semble*, Stoner v. Ellis, 6 Ind. 161; Gooch

deeds[1] and other written contracts; and the exception is made in respect to negotiable paper because, being intended for circulation, the greater strictness and watchfulness is necessary.

§ 1419. In California it has been held that it is not necessary for the plaintiff to explain the alteration where it has been made in printed words, it being then presumed that the parties had changed the printed form to suit their intentions. And accordingly, where the plaintiff sued on a note on which the printed words "payable at the banking house of Dale and Simpson" had been erased by a line drawn through them, he was allowed to recover without showing how or when the erasure was made.[2] And, in Iowa, it is considered that the fact that a portion of an indorsement signed by the defendant is written in a different ink and handwriting from the balance, does not afford *prima facie* evidence of a fraudulent alteration so as to require the plaintiff to explain the same.[3]

§ 1420. By some authorities it is considered that where the alteration is against the interest of the party claiming

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v. Bryant, 13 Me. 386, in which case a figure of the date had been altered. *Held*, no explanation devolved on plaintiff. Farnsworth v. Sharp, 4 Sneed, 55. In Sayre v. Reynolds, 2 South. 737, it appeared the word "first," in the date "first September," had been erased, and "second" written over it. The court said that, as alteration could produce no effect but make the note bear interest one day later, to presume a forgery "would be a violation of all probabilities." Cumberland Bank v. Hall, 1 Halst. 215; Bailey v. Taylor, 11 Conn. 531; Davis v. Jenney, 1 Metc. (Mass.) 221; Cochran v. Nebcker, 48 Ind. 459.

[1] Doe v. Catamore, 16 Q. B. 745; 5 E. L. & Eq. 349, Lord Campbell, C. J.: "A deed cannot be altered after it is executed without fraud or wrong; and the presumption is against fraud or wrong." As to interlineation, see Herrick v. Malin, 22 Wend. 394. That alteration of deed must be explained. See Piercy v. Piercy, 5 West Va. (Hagans), 199.

[2] Corcoran v. Dale, 32 Cal. 89.

[3] Wilson v. Harris, 35 Iowa, 507. In Paramore v. Lindsey, 63 Mo. 67, it is said: "If nothing appears to the contrary, the alteration will be presumed to be cotemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as the person by whom, and the interest with which, the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence."

under it, then, at all events, the law will not throw upon him the burden of accounting for it, since it would be unreasonable to presume that a party acted against his interest.[1] But it is answered that the plaintiff may have intended and expected the alteration to be beneficial to him; and while the presumption may be very slight against him, and easily removed, that it is better to adhere to the general principle, which seems best calculated to prevent frauds.[2] The exception, however, seems to be a reasonable one, as self-interest is a prevailing motive to human action; and it is against all probability that one should do an act calculated to injure himself.

§ 1421. Where an alleged alteration is not apparent on the face of the instrument, the burden of proving it is upon the party alleging it.[3] And it has been held in some cases that an indorsement on the back of the instrument will be deemed to have been cotemporaneous with its execution;[4] in others the contrary.[5]

The question as to the burden of proof in respect to alterations is generally affected by all the surrounding circumstances; and one fact or another shifts it to and fro, the jury being left to weigh the testimony and determine the issue with all the lights that can be thrown upon it.[6]

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[1] 1 Greenleaf on Evidence, § 564; Bailey v. Taylor, 11 Conn. 531; Huntington v. Finch, 3 Ohio St. 449 (1854); Pullen v. Shaw, 3 Dever. 238. See also Tillon v. Clinton, &c. Ins. Co. 7 Barb. 568; Heffelfinger v. Shutz, 16 Serg. & R. 46.

[2] 2 Parsons N. & B. 579; Chism v. Toomer, 27 Ark. 108. Note altered from $310 to $110; *held*, that plaintiff must show it was made before delivery, or by maker's consent.

[3] Meckel v. State Sav. Inst. 36 Ind. 357.

[4] Brooke v. Smith, Moor, 679.

[5] Emerson v. Murray, 4 N. H. 171.

[6] See, on this subject, Admr's of Beaman v. Russell, 20 Vt. 210; and the instructive opinion of Hall, J., Bailey v. Taylor, 11 Conn. 531; Davis v. Jenney, 1 Metc. (Mass.) 221.

CHAPTER XLIV.

THE LAW OF SET-OFF IN ITS APPLICATION TO NEGOTIABLE INSTRUMENTS.

SECTION I.

THE GENERAL DOCTRINES OF SET-OFF.

§ 1422. A brief statement of the general principles of set-off—of those especially which have application to negotiable instruments—is all that would be appropriate to this treatise. By set-off is meant the discharge of one claim by another, which is "set-off" against it. It was formerly sometimes called "stoppage," because the amount sought to be set-off was "stopped" or deducted from the cross demand.[1]

Set-off was unknown to the common law, it being considered inconvenient to try two opposing claims in one suit. But still greater inconvenience arose from disallowing it; and courts of equity first introduced it, the want of it at law being found productive of great mischief. "The natural sense of mankind was first shocked at this doctrine in the case of bankrupts; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt, and receive only a dividend of what the bankrupt owed him."[2] In Virginia, the setting off of cross demands was allowed by statute as early as 1644.[3] In England, various statutes have perfected the law concerning it; and in all of the United States it is regulated likewise by statutory enactments.

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[1] Byles on Bills (Sharswood's ed.) [*350], 523.

[2] Byles (Sharswood's ed.) [*350], 524.

[3] See 5 Robinson's Practice, 958; and see the existing Virginia statute expounded in Allen v. Hart, 18 Grat. 727, and Wartman v. Yost, 22 Grat. 603.

§ 1423. In England, and generally in the United States, actions *ex contractu* are the only suits to which matters of set-off may be pleaded, and they must be actions for definite ascertainable amounts. Actions sounding in damages, such as trespass, trover, &c., are not subject to the defense of set-off, because the sums recoverable are unliquidated;[1] and actions *ex contractu* for unliquidated damages follow the same rule.[2]

A set-off is not available as a defense against a lien, as, for instance, that of a workman on a chattel for his wages.[3] In Virginia, it is available in an action upon a forthcoming bond taken on a warrant of distress.[4]

§ 1424. In an action at law, none but a legal debt can be set off in England and in some of the States.[5] But in other States, a plea of equitable set-off is admitted.[6] Equity will not relieve a party who has neglected to plead a set-off at law.[7] But there are cases in which set-off is not available at law, and which present peculiar circumstances for equitable relief.

§ 1425. The counter demand, in order to be available as a set-off, must be an actual subsisting debt which has matured,[8] and has not been extinguished, nor barred by the statute of limitations.[9] In other words, it must be such a debt as would support an independent suit.[10] As a general rule, also, it must be capable of certain and exact ascertainment, and not a mere claim for unliquidated damages.[11] Thus, where it appeared that a debtor had drawn and delivered to

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[1] Byles on Bills (Sharswood's ed.) [*351], 525; 2 Parsons N. & B. 616. In trover, however, it has been held that mutual demands arising out of the same subject-matter might be adjusted. Stow v. Yarwood, 14 Ill. 424.

[2] Gordon v. Brown, 2 Johns. 150; Byles [*525], 351.

[3] 2 Parsons N. & B. 617. [4] Allen v. Hart, 22 Grat. 722.

[5] Wake v. Tinkler, 16 East, 36; McDade v. Mead, 18 Ala. 214; Milburn v. Guyther, 8 Gill, 92.

[6] Watkins v. Hopkins' Ex'rs, 13 Grat. 743.

[7] *Ex parte* Ross, Buck, 127. [8] Evans v. Prosser, 3 T. R. 186.

[9] Williams v. Gilchrist, 3 Bibb, 49; Turnbull v. Strohecker, 4 McCord, 210; Jacks v. Moore, 1 Yeates, 391; 2 Parsons N. & B. 617.

[10] Pate v. Gray, 1 Hempst. 155. [11] Harrison v. Wortham, 8 Leigh, 304.

his creditor an order on a third person, payable at sight, and directed the amount, when received to be placed to the credit of his account, and the creditor, without the knowledge of the drawer, took the drawee's acceptance at sixty days, and before the expiration of that time the acceptor died insolvent. The creditor then sued the drawer upon the original debt, and the latter pleaded as set-off the amount or the draft he had given; but it was held that the drawer's claim on account of the draft was for unliquidated and uncertain damages for the creditor's failure to collect it, and therefore could not be allowed as a set-off.[1]

§ 1426. A judgment cannot be set off against an action brought by a judgment debtor in some States;[2] in others it may be.[3] And in Virginia the assignee of a judgment may plead it as offset to an action against him.[4]

§ 1427. Set-off being entirely a subject of statutory jurisprudence, save in those cases which present circumstances for equitable interference, any question arising would be referable for its solution to the particular statute of the State whose laws controlled it. There are, however, some doctrines which will be found to have extensive and, indeed, general application; but, as the adjudicated cases for the most part have been decided in the interpretation of statutes, their pertinence to any given question can only be ascertained by comparison of the enactment under discussion with that which has been interpreted.

There must, as a rule, be mutuality between the parties; and the party owing the debt on one side must be the identical party to whom it is due on the other, whether the set-off be claimed at equity or in law.[5]

§ 1428. (1) *As to partnership debts.*—A debt due by an individual partner in his own right cannot be set off against

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[1] Harrison v. Wortham, 8 Leigh, 304.

[2] Sketoe v. Ellis, 14 Ill. 75; Rae v. Halbert, Id. 572.

[3] Wartman v. Yost, 22 Grat. 595; Allen v. Hart, 18 Grat. 728.

[4] Wartman v. Yost, 22 Grat. 603.

[5] Ford v. Thornton, 3 Leigh, 495; Byles on Bills [*352], 528.

a debt sued upon by the firm of which he is a member;[1] nor can a debt due by a firm be set off against a debt claimed by an individual member.[2] And an individual defendant cannot set off against an individual plaintiff a debt by plaintiff to a firm in which he and defendant are partners.[3]

So if a firm be sued, they cannot set off a debt due to one or more of the partners, but not to all.[4] But one partner may settle a debt due to the firm by setting off against it a debt due from himself.[5] And where a surviving partner, to whom has passed the effects and credit of the firm by the death of his copartner, sues or is sued, his individual debts may be set off, because he sues personally, though bound to account with the deceased partner's personal representative.[6] But a debt of one firm to another firm cannot be set off in a suit brought by the representative of a member of one firm, who has died since contracting the debt, against one member of the other firm.[7]

§ 1429. (2) *As to joint and several debts.*—In a suit brought by an individual there cannot be set off against him a debt due by him jointly with another;[8] and in a suit by several plaintiffs there cannot be set off a debt due by one

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[1] Ritchie v. Moore, 5 Munf. 388; Scott v. Trents, 1 Wash. (Va.) 79; Armistead v. Butler, 1 H. & M. 176.

[2] Duramus v. Harrison, 26 Ala. 326; Mitchell v. Sellman, 5 Md. 376; Pinckney v. Keyler, 4 E. D. Smith, 469; 2 Parsons N. & B. 608.

[3] Land v. Cowan, 19 Ala. 297.

[4] Byles on Bills [*352], 528.

[5] Wallace v. Kelsall, 7 M. & W. 264.

[6] Slipper v. Stidstone, 5 T. R. 493; French v. Andratte, 6 T. R. 582; Meader v. Scott, 4 Vt. 26; Cowden v. Elliott, 2 Mo. 60; Holbrook v. Lackey, 13 Metc. 132; Byles on Bills [*353], 528; 2 Parsons N. & B. 608.

[7] Reed v. Whitney, 7 Gray, 533; Walker v. Eyth, 25 Penn. St. 216.

[8] Middleton v. Pollock, L. R. 20 Equity Cases, 204; Porter v. Nekervis, 4 Rand. 359; Glazebrook's Adm'r v. Ragland, 8 Grat. 332; Christian v. Miller, 3 Leigh, 78; Ritchie v. Moore, 5 Munf. 388; Robertson v. Parks, 3 Md. Ch. 65; Blankenship v. Rogers, 10 Ind. 333; Wilson v. Keedey, 8 Gill, 195; Perkins v. Hawkins, 9 Grat. 650. *Held* that a bond of the plaintiff's intestate was not a legal set-off against a bond given to the plaintiff, but might become a set-off by agreement between the parties. In Virginia it has been held that a debt due by A. & B. jointly to C., and a debt due by C. to B. alone could not be set off either in equity or at law. Gilliatt v. Lynch, 2 Leigh, 493.

of them.[1] But in some of the States of the United States a note made by joint and several makers may be set off against either in an action brought by either of them on a debt due to him individually.[2] And where a plaintiff sues several defendants jointly and severally liable, either may file as set-off against the claim as to himself a debt due him by the plaintiff.[3] The rule is otherwise in England, where the debts between the defendant and plaintiff must be strictly "mutual," in order to admit the one as set-off against the other.[4] In Virginia it is expressly provided by statute that, "although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all, but only to a part of them, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal." And this relation may be shown by parol proof.[5]

§ 1430. (3) *As to debts of husband and wife.*—It has been held in England that if the husband sues alone on a note given his wife, a set-off of a debt due from her *dum sola*, cannot be pleaded against him, though a debt due by himself might be; though he may join her in the suit, in which case a debt due by her *dum sola* would be a good set-off.[6] Professor Parsons criticises this decision, and considers that as the husband is generally liable for the wife's debts, the set-off should be available against him, whether he joins his wife in the action or not.[7]

§ 1431. (4) *As to agents and trustees.*—A debt of an agent cannot be set off in a suit against his principal;[8] nor

[1] Johnson v. Kent, 9 Ind. 252.

[2] Powell v. Hogue, 8 B. Mon. 443; Pate v. Gray, 1 Hemp. C. C. 155; 2 Parsons N. & B. 609.

[3] Briggs v. Briggs, 20 Barb. 447; Wartman v. Yost, 22 Grat. 595.

[4] Isbery v. Bowden, 8 Wels. H. & G. 852; Wartman v. Yost, 22 Grat. 604.

[5] Wartman v. Yost, 22 Grat. 603; and see Code of Virginia, 1873.

[6] Burrough v. Moss, 10 B. & C. 558 (21 E. C. L. R.)

[7] 2 Parsons N. & B. 615.

[8] Carman v. Garrison, 13 Penn. St. 158; Wilson v. Codman, 3 Cranch, 193; Foster v. Hoyt, 2 Johns. Cas. 327.

can a debt due the defendant as trustee or guardian be set off against the plaintiff, who sues him individually;[1] though it seems that if a trustee sues for another's benefit, a debt against that other may be set off.[2]

But when an action is brought for another's use, the defendant may set off a debt due by the beneficiary.[3] And it may be shown that the plaintiff is really suing as agent and for the benefit of an undisclosed principal, against whom the set-off would be available.[4]

In an action against principal and surety, a debt due by the principal alone to the plaintiff may be set off;[5] and so might a debt due by the plaintiff to the surety be set off by the surety against him, leaving him to settle with the principal.[6]

§ 1432. (5) *As to personal representatives.*—A debtor to the estate of a decedent may plead as set-off against his personal representative, any debt due him which was contracted in the decedent's lifetime,[7] provided the debt due the representative did not accrue after the decedent's death.[8] In an action by the representative on debts due the decedent in his lifetime, the decedent cannot set off an amount paid by him as the decedent's surety after his death,[9] nor can he set off against the representative debts of the decedent purchased after his death.[10]

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[1] Glazebrooke's Admr. v. Ragland, 8 Grat. 342, Baldwin, J.

[2] White v. Ford, 22 Ala. 442.

[3] Sheldon v. Kendall, 7 Cush. 217; Pates v. St. Clair, 11 Grat. 24; Winchester v. Hackley, 2 Cranch, 342; Sykes v. Lewis, 17 Ala. 261; Forkner v. Dinwiddie, 3 Ired. 34; Bottomley v. Brooke, cited 1 T. R. 621.

[4] Pettee v. Prout, 3 Gray, 502; Pates v. St. Clair, 11 Grat. 24.

[5] Concord v. Pillsbury, 33 N. H. 310; Mahurin v. Pearson, 8 N. H. 539; Kent v. Rogers, 24 Miss. 306; Slayback v. Jones, 9 Ind. 470; Newell v. Salmons, 22 Barb. 647.

[6] Lynch v. Bragg, 13 Ala. 773.

[7] Richardson v. Parker, 2 Swan, 529; Boardman v. Smith, 4 Pick. 212; Light v. Lieninger, 8 Barr, 403.

[8] Fry v. Evans, 8 Wend. 530; Wolfersberger v. Bucher, 10 Serg. & R. 10; Bizzell v. Stone, 7 Eng. (Ark.) 378; Armstrong v. Pratt, 2 Wisc. 299; Lambarde v. Older, 17 Beav. 542; 23 E. L. & Eq. 45.

[9] Minor v. Minor, 8 Grat. 1.

[10] Root v. Taylor, 20 Johns. 137.

§ 1433. *Where an action is brought by executors* upon an contract made with them, the defendant cannot set off a debt due from the testator, though a judgment may have been obtained for the same against the executors; for if a set-off of this nature were allowed, the defendant might gain an improper advantage over other creditors. He might obtain payment of his debt out of the assets, when, according to law, the whole assets ought to be applied to creditors of higher dignity.[1] Nor in a suit by a personal representative, on a bond to him as such, can the defendant set off money subsequently received by him as such.[2] But it might be different if they have sufficient assets.[3]

§ 1434. There is generally made a distinction between a solvent and an insolvent estate. In the former case the debt may be set off, although not mature and due at the death of the deceased. But if the estate of the deceased be insolvent, the death seems to fix the rights of the parties, and a debt cannot be set off which was not due at the time of the decease, although it matured before action was brought.[4]

SECTION II.

HOW FAR THE LAW OF SET-OFF IS APPLICABLE TO NEGOTIABLE INSTRUMENTS.

§ 1435. The doctrine of set-off has but a limited application to negotiable paper, it being a distinguishing characteristic of negotiable securities that when they have passed into the hands of third parties for value, no set-off admissible in pleadings between original parties is available. Between the original parties, however, or parties between whom there is a privity—that is, between maker and payee, drawer and

[1] White v. Bannister's Ex'rs, 1 Wash. (Va.) 166; Brown's Adm'x v. Garland, 1 Wash. (Va.) 221; Steel v. Steel, 12 Penn. St. 64.

[2] James v. Johnson, 22 Grat. 461.

[3] White v. Bannister's Ex'rs, 1 Wash. (Va.) 166.

[4] 2 Parsons N. & B. 611.

acceptor, indorser and immediate indorsee—a set-off may be pleaded to negotiable securities as well as to any other kind. The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferrer is subject, does not extend so far as to admit set-offs which might be available against the transferrer. A set-off is not an equity; and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferree is not subject to a set-off which would be good against the transferrer, arising out of collateral matters.[1]

§ 1436. This is the English rule on the subject. In a leading case, where the set-off existed at the time of the transfer, Bayley, J., said: "This was an action on a promissory note made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due; for the defendant it was insisted that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand, it was contended that this right of set-off, which rested on the statute of set-off, did not apply. The impression on my mind was, that the defendant was entitled to the set-off; but on discussion of the matter with my Lord Tenterden and my learned brothers, I agree with them in thinking that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters."[2] In a subsequent case, where it was averred that the indorsee received the bill with notice of the set-off, it was held that it could not be pleaded against him.[3] And in a more recent case it was held that the right of an indorsee of an overdue bill to sue

[1] Chitty on Bills (13th Am. ed.) [*220], 251; Story on Bills, § 220; Story on Notes, § 178; Byles on Bills (Sharswood's ed.) [*353], 529; see also Edwards on Bills, 260; 2 Parson's N. & B. 603, 604; see Chapter XXI, on Transfer by Indorsement, §§ 725 *et seq.* vol. 1.

[2] Burrough v. Moss, 10 B. & C. 558; 5 M. & R. 296; Chitty, Jr. 1481.

[3] Whitehead v. Walker, 10 Mees. & W. 696.

the acceptor was not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer before indorsement, of his election to set off the amount against the bill; and that the indorsee was not affected by the right of set-off between the acceptor and the drawer, although the bill was indorsed without value, and for the purpose of defeating the set-off.[1]

§ 1437. In the United States there is a conflict of decisions. In some of the States the English rule, excluding set-offs which existed at the time of the transfer of the overdue paper, is followed.[2] In others such set-offs are admitted.[3] But it seems to be the uniform ruling everywhere, that, although the paper be transferred after maturity, no set-offs between antecedent parties, which arose after the transfer, will be available against the indorsee.[4] In some of the

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[1] Oulds v. Harrison, 28 Eng. L. & Eq. 524.

[2] Davis v. Miller, 14 Grat. 8 (the court seems to favor the English rule); Annon v. Houck, 4 Gill, 332; Hughes v. Large, 2 Barr, 103; Epler v. Funk, 8 Id. 468; Clay v. Cottrell, 6 Har. 413; 2 Rob. Prac. (new ed.) 252, 253.

[3] Peabody v. Peters, 5 Pick. 1; Braynard v. Fisher, 6 Id. 355; Grew v. Burditt, 9 Id. 265; Pettee v. Prout, 3 Gray, 502; Shirley v. Todd, 9 Greenl. 82; McDuffie v. Dame, 11 N. H. 244; Martin v. Trowbridge, 1 Vt. 477; McKenzie v. Hunt, 32 Ala. 494; Bond v. Fitzpatrick, 4 Gray, 89; Nixon v. English, 3 McC. 549; Perry v. Mays, 2 Bailey, 254.

[4] Davis v. Miller, 14 Grat. 8. Moncure, J., said on this subject: "Whatever conflict of authority there may be upon the question whether the equities subject to which an indorsee takes an overdue note, embrace set-offs in favor of the maker against the payee, existing at the time of the indorsement, I have been able to find no case in which it was held, or even said, that set-offs between those parties, arising or acquired after the indorsement, even though without notice thereof, are good against the indorsee. On the contrary, it was expressly decided in Baxter v. Little, 6 Metc. 7, that they are not." Shaw, C. J., in his able opinion, said: "A note does not cease to be negotiable, because it is overdue. The promisee by his indorsement may still give a good title to the indorsee. Notes or other matters of set-off acquired by the defendant against the promisee after such transfer cannot be given in evidence in defense to such note, although the maker had no notice of such transfer at the time of acquiring his demand against the promisee. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments, and offsets in the nature of payment. The ground is, that by this fact he is put upon inquiry, and therefore he shall be bound by all existing facts of which inquiry and true information could apprise him; but these could only apprise him of demands then acquired by the maker against the payee."

States this question is settled by express statute on the subject. In New York, for instance, the statute admits set-offs existing at the time of transfer of the overdue note or bill.[1]

[1] Edwards on Bills, 260. The point was considered doubtful (outside of the statute) in Miner v. Hoyt, 4 Hill, 193, 197.

CHAPTER XLV.

EXCHANGE AND RE-EXCHANGE; AND DAMAGES, UPON DISHONORED NEGOTIABLE PAPER.

SECTION I.

NATURE OF DAMAGES, AND OF EXCHANGE.

§ 1438. *Statutory enactments.*—In the United States the whole subject of re-exchange and damages has been very much simplified by the enactment of statutes establishing fixed amounts of damages in lieu of re-exchange; and even previous to statutory provisions on the subject, mercantile custom had, in some of the States, prescribed fixed rates of damages equally as effectually. Immemorial usage, at an early day, allowed ten per cent. as damages in lieu of re-exchange on bills drawn in Massachusetts on England, and returned protested,[1] and twenty per cent. on the like bills drawn in New York.[2] In England it seems that a similar rule was adopted in the commerce between England and the East Indies, to allow a certain per cent. in particular cases in lieu of re-exchange, but it was merely conventional as between parties agreeing to it.[3]

In 1700 a statute was passed in the Colony of Pennsylvania allowing twenty per cent. on bills drawn upon England or any part of Europe;[4] and, in 1743, Rhode Island adopted one of similar purport.[5]

Now every State has recognized the convenience and utility of regulating the matter by statute, and their codes contain ample provisions on the subject. But they lack

[1] Grimshaw v. Bender, 6 Mass. 157.
[2] Hendricks v. Franklin, 4 Johns. 119.
[3] Auriol v. Thomas, 2 Term R. 52.
[4] Francis v. Rucker, Ambler, 672.
[5] Brown v. Van Braum, 3 Dallas, 344.

uniformity, and consequently, in transactions between the States, there is great diversity in the rights and liabilities of parties. It has been thought that Congress has a right to prescribe fixed rates of damage, under the clause of the constitution authorizing it to regulate commerce between the States.[1] But no action has been taken by that body.

§ 1439. *These statutory damages* are not given as a penalty for drawing without authority, but as commutation for interest, damages, and re exchange.[2] "It is in truth," says Gibson, C. J., "a liquidation of the damages, not by the parties, but by the law fixing the compensation for the loss beforehand, to save time and litigation; and if damages need not be specially laid where there is no statute on the subject, as they certainly need not be in England, no rule of pleading requires them to be laid in their liquidated form."[3] The damages given by statute constitute as much a part of the contract as the interest.[4] But while they are now universally fixed in amount by statute, the whole theory from which they are derived springs from the right of the holder to indemnity for dishonor of the bill, which was formerly worked out through the doctrine of re-exchange. And it is still necessary to a thorough understanding of the subject of damages that the rules of the law merchant respecting exchange and re-exchange should be held in view.

§ 1440. The very name of the instrument, "Bill of Exchange," indicates the office which it so frequently performs, that of exchanging a debt in one place or country for a debt in another place or country. When a person in one place or country owes money to a party in another place or country, he does not in general discharge the debt by transmitting the money, which would involve risk and expense, but purchases from some banker or other person who has money due

[1] Mr. Verplanck's report to House of Representatives, March 22, 1826; Edwards on Bills, 750; Sedgwick on Damages, 274; 1 Parsons N. & B. 654.

[2] Bangor Bank v. Hook, 5 Greenl. 174; Allen v. Union Bank, 5 Whart. 420; Lenning v. Ralston, 23 Penn. St. 137.

[3] Lloyd v. McGarr, 3 Barr, 474.

[4] Bank U. S. v. U. S. 2 How. 711.

him at the place where he has the amount to pay, a bill drawn for that amount upon the banker or such other person's debtor. This bill is drawn payable to the purchaser's creditor, or to himself, and indorsed by him to his creditor, as he sees fit, and when presented to and paid by the drawee it extinguishes the original debt. The facility with which such a bill may be procured depends upon the commercial relations between the two places or countries betwixt which it is required.

Thus: If there are more debts due from New York to London than from London to New York, the demand in New York for bills on London will be greater than the demand in London for bills on New York; and, consequently, in London, where there are many creditors of debtors in New York, it will be easier and cheaper to procure a bill of exchange on New York than it will be in New York, where there are a less number of creditors of London debtors, to procure a bill on London.

It would follow from this state of affairs that in London bills on New York would be at a discount, creditors preferring to take lesser amounts of cash in hand than to undergo the trouble and delay of collecting their debts in New York. This discount, which is in fact a sum paid by the London drawer of an order of payment on his New York debtor, is called exchange, and the course of exchange is said to be against New York. It is also in favor of London, for in New York a draft on London, being in greater demand, would bear a premium; that is, a purchaser would pay for it more than the amount of its face. This premium is also called exchange.[1]

It follows that the rate of exchange between two countries is that amount of premium which it will cost to replace a sum of money in the one country in the other; or which a right to a sum of money in one country will produce in another country. In other words, it is the difference in the value of the same amount of money in different countries.

[1] See Thomson on Bills, 439.

§ 1441. *Natural and artificial exchange.*—The rate of exchange between two countries is sometimes natural and sometimes artificial. "Thus," observes Parsons, "an exchange is never nominally at par, because our statute makes the pound sterling equal to only four dollars and forty-four cents, which is nearly ten per cent. less than it is really when paid in gold. Accordingly, while £100 is legally worth only $444, to pay that sum in London one must pay in New York, if the exchange is actually at par, about $484. A recent United States statute has provided that, for the purpose of estimating duties on imported goods, the pound sterling shall be calculated at $4 84, which is about its true value. (Statute July 27, 1842, ch. 66, 5 U. S. Statutes at Large, 496.) But the matter of exchange is left to itself. Merchants regulate that by adding from nine to ten per cent. to the actual rate of the day (or that which would be the rate if it were determined by business alone), and thus the buying and selling rate is made. This is seldom less than eight per cent., for if it falls so low, or nearly so low, gold comes over from England, and seldom more than eleven, for if it rises so high, or near this rate, gold instead of bills is sent to England." [1]

§ 1442. *Par of exchange.*—By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country, and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins so fixed by the mint standard of the respective countries.[2] Marius says: "*Pair*," as the French call it, "is to equalize, match, or make even, the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in other kind of money in another place, without

[1] 1 Parsons N. & B. 663. By more recent enactment of Congress, the value of the sovereign or pound sterling is placed at four dollars eighty-six cents and six and one-half mills. See Revised Statutes U. S. 707; act March, 1873, ch. 268, v. 17, p. 603.

[2] Cunningham on Bills, 417; Story on Bills, § 30.

having respect to the current of exchange for the same, but only to what the moneys are worth."[1] It is necessary to this purpose to ascertain the intrinsic values of the different coins; and then it is a mere matter of arithmetical computation to arrive at the amount of the one which will be the exact equivalent of a certain amount of the other, into which it is to be exchanged. When this has been accomplished, and the exact equivalent of a certain amount in one currency has been ascertained in another, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between these amounts at different places.

§ 1443. Gilbert remarks on this subject, in his Treatise on Banking: "The real par of exchange between two countries is that by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3 17*s.* 10½*d.* per ounce. In France silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually, it bears a premium or *agio.* In the above quotation, this premium is stated to be 7 per *mille;* that is, it would require 1,007 francs in silver to purchase 1,000 francs in gold. At this price the natural exchange, or that at which an ounce of gold in England would purchase an ounce of gold in France, is 25.32½. But the commercial exchange—that is, the price at which bills on London would sell on the Paris Exchange—is 25 francs, 25 cents, showing that gold is 0.30 per cent. dearer in Paris than in London. Tables have been constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam."[2] And in Cunning-

[1] Marius on Bills, 4.

[2] Gilbert on Banking, 424, 425.

ham on Bills, it is said: "By the par of exchange is meant the precise equality between any sum or quantity of English money, and the money of a foreign country into which it is to be exchanged, regard being had to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint, he made, by order of council, assays of a great number of foreign coins to know their intrinsic values, and to calculate thereby the par of exchange between England and other countries; of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Dutot, in a late book, entitled *Reflexions Politique sur les Finances*, to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer."[1]

SECTION II.

NATURE OF RE-EXCHANGE AND DRAWER'S LIABILITY.

§ 1444. From the use which bills of exchange subserve in transmitting money, arises the liability upon the part of the drawer for the payment of what is termed "re-exchange," in the event of the dishonor of the bill in the place or country upon which it is drawn. Thus, suppose A. in San Francisco, California, desires a thousand dollars in New York city, New York. He purchases a bill of exchange from a San Francisco banker, drawn by him on a house in New York, and pays therefor a premium of (say) three or five per cent. In other words, he purchases New York exchange in San Francisco, and is entitled to demand in New York of the drawee the thousand dollars for which he has paid the premium. Now, should it happen that the bill were dishonored in New York, it is obvious that if the holder could only recover of the drawer in California the thousand dollars

[1] Gilbert on Banking, p. 417.

which he should have received in New York, he would lose the premium which he paid for the exchange, and suffer without remedy the loss and inconvenience of returning the bill to California for recourse against the drawer.

And even if no premium had been paid, the holder entitled under the drawer's contract to receive the thousand dollars in New York, would not be indemnified if he could only sue for and obtain that amount in California. From these circumstances grew the customary right of the holder of the bill, by the law merchant, to draw a bill upon the drawer—literally a bill of re-exchange—for the principal amount which he should have received, increased by the costs of protest, and the sum which it will cost to replace that principal amount at the place where it should have been paid. Thus, if the exchange between New York and California were ten per cent., the holder of a bill for a thousand dollars drawn in California on New York, would, upon its protest in New York, be entitled to redraw upon the California drawer for eleven hundred dollars, with his necessary expenses and interest added.[1]

§ 1445. *Re-exchange*, then, may be defined to be the amount for which a bill may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest; for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment.

The cross-bill is called in French the *retraite*. The amount for which it is drawn is called in law Latin, *ricambium*, in Italian, *recambio*, and in English, re-exchange. In point of fact, the re-exchange bill is seldom, if ever, drawn in England or in the United States, but the right of the holder to draw it is recognized by the law merchant of all nations, and it is

[1] See D'Tastet v. Barring, 11 East, 265.

by reference to this supposed redraft upon the drawer that the re-exchange is computed.[1]

§ 1446. The United States Supreme Court remarks on this subject: "The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed."[2]

§ 1447. The drawer may, if he pleases, limit the amount of re-exchange and expenses, in the event of the bill being dishonored, by subscribing: "In case of non-acceptance or non-payment, re-exchange and expenses not to exceed $——," or some such words. And then the holder cannot recover a larger amount.[3] It might be better to say, "re-exchange and expenses shall be so much," for then the amount is definitely determined.[4]

SECTION III.

INDORSER'S AND ACCEPTOR'S LIABILITY FOR RE-EXCHANGE AND DAMAGES.—ACCUMULATIONS OF RE-EXCHANGE AGAINST DRAWER AND INDORSER.

§ 1448. Every indorser of a bill is a new drawer, and the holder may therefore redraw upon any indorser (as well as

[1] Byles on Bills (Sharswood's ed.) [*402], 588.
[2] Bank of the United States v. United States, 2 How. 737.
[3] Chitty on Bills (13th Am. ed.) [*166], 190. [4] 1 Parsons N. & B. 653.

upon the drawer) for the re-exchange between the country upon which the bill is drawn and that where the indorsement was made. And as soon as the indorser pays the re-exchange, he may thereupon redraw upon any antecedent indorser, or upon the drawer, for the whole amount, including the re-exchange between the place of dishonor and of indorsement, which he has been required to pay; and, in addition, the re-exchange between the place of such payment and the place upon which the redraft is drawn.[1] This principle rests upon the obvious equity and justice of indemnifying each several and successive party for the loss which he suffers by the breach of contract of his antecedents; and although when the bill has passed through numerous hands, the drawer may be burdened with successive re-exchanges between different places, it is only the consequence of his own engagement, and what is necessary to reimburse and save harmless those who trusted to its performance.[2]

Story says, upon the authority of Jousse, that if there be a direct commercial intercourse between the country where the acceptance and payment are to be made, and the country where the drawer lives, the rate of that re-exchange is the proper amount to be allowed to the holder, and intimates that it is only when such intercourse is disturbed that the drawer is bound for the re-exchange accumulating by the circuitous mode of transmitting and negotiating the bill in the

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[1] Chitty on Bills (13th Am. ed.) [*686], 767; Edwards on Bills, 732; 1 Parsons N. & B. 652; Wharton's Conflict of Laws, § 458; Westlake on Int. Law, § 234.

[2] D'Tastet v. Baring, 11 East, 265; Crawford v. Branch Bank, 6 Ala. N. S. 15; Mellish v. Simeon, 2 H. Bl. 379 (1794). In this case the bill was drawn in England by Simeon on Boyd & Co., in Paris. It was negotiated through Amsterdam, in Holland, and refused payment, and was sent back to the indorser at Amsterdam, and by him to the English drawer, with the accumulation of £300 damages. Lord Chief Justice Eyre said: "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that it might be a question whether the drawer was liable for the re-exchange occasioned by the circuitous mode of returning the bill through Amsterdam, but the jury decided." Buller and Heath, JJ., concurred.

various countries through which it must pass.[1] But none of the English cases cited recognize this distinction, nor does it appear to be a principle of the law merchant resting either upon reason or authority. As the indorsers are drawers, there is no reason why the holder should not draw upon the one as well as another, and that the party who has put his bill in circulation, should not indemnify those who received it. Even the fact that the drawee is prohibited by the laws of his country from accepting or paying the bill does not release the drawer's liability, for he "who undertakes for the act of another, undertakes that it shall be done at all events."[2] But no indorsee can avail himself of but one satisfaction of re-exchange, nor will any drawer or indorser be liable for re-exchange except when it is allowed by the laws of the country where the bill is drawn, or the indorsement made.[3]

§ 1449. *Whether or not acceptor liable for re-exchange.*— Many of the commentators on bills of exchange, state emphatically that the liability for re-exchange is peculiar to the drawer and indorser of a bill, and does not extend to the acceptor.[4] Others consider the acceptor equally liable.[5]

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[1] Story on Bills, § 402, quoting Jousse Comm. sur L'Ord, 1673, tit. 6, art. 4, pp. 139, 140. In Scotland, Story's view has been taken by Forbes and Glen (see Forbes, 151; Glen, 274). But Thomson exposes its fallacy with his usual clearness and discrimination. See Thomson on Bills, p. 445, where it is said: "It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonor, to redraw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive redrafts, because that results from the negotiability of the document which he has issued."

[2] Mellish v. Simeon, 2 H. Bl. 376, Heath, J.

[3] Story on Bills, § 403.

[4] Chitty on Bills (13 Am. ed.) [*686], 767; Chitty, Jr., on Bills, 41; Byles on Bills (Sharswood's ed.) [*402], 588; 3 Kent Com. lect. 44; Edwards on Bills, 733.

[5] Thomson on Bills (Wilson's ed.), 446; 1 Parsons N. & B. 650. Bayley says, p. 306, chap. x, note 41: "It seems reasonable that he should be liable to all parties when he has effects, and to all excepting the drawer when he has not."

And others still take an intermediate view, that he is liable only when he has agreed with the drawer or indorser, for a valuable consideration, to pay the bill, and has failed to do so; and the drawer or indorser has consequently been compelled to pay re-exchange. Then they say he is bound to reimburse them.[1] In England, where an English mercantile firm had directed an American merchant of Pennsylvania to purchase corn for them, and draw on them for reimbursement —and the bills drawn in pursuance of this direction were not paid, some of them not even accepted—the Pennsylvania merchant was permitted to prove against the English firm not only the principal amount, but also for twenty per cent. allowed by the laws of Pennsylvania against "the drawer and all others concerned," when bills upon England were returned protested.[2]

This case would seem clearly to maintain the acceptor's liability for re-exchange to the drawer. But it was afterward held in England, that the holder could not recover re-exchange from the acceptor, who, it was said, by his acceptance only charges himself with the liability to pay according to the law of this country, and if he do not pay, the holder has his remedy over against the drawer.[3] And Lord Ellenborough said, in one of the cases where it was sought to charge the acceptor for re-exchange because the holder had suffered to that extent by the dishonor: "You may as well state that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage."[4] But in a recent

In Kyd on Bills, 141, it is said: "The acceptor must pay re-exchange and all charges." Pothier, 117; 1 Bell Com. B. 3, chap. 2, § 4, p. 407 (5th ed.)

[1] Story on Bills, § 398; Sedgwick on Damages [242], 271.

[2] Francis v. Rucker, Ambler, 672 (1768), Lord Campbell, saying: "The 20 per cent. is a liquidated thing, and therefore differs from the case of re-exchange. The reason of not admitting proofs of the difference upon re-exchange is because it is uncertain damage which cannot be proved. * * The nature of the engagement is to pay the bills or the 20 per cent., the consequential damages according to the law of Pennsylvania, the same as if it had been by express stipulation."

[3] Napier v. Schneider, 12 East, 420 (1810).

[4] Woolsey v. Crawford, 2 Camp. 445 (1810); Dawson v. Morgan, 9 Barn. &

case before the Chancery Division of the High Court of Justice, it was held that the drawer of a bill of exchange in a foreign country, upon its dishonor and protest, is entitled to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of re-exchange. And Vice-Chancellor Malins, referring to Lord Ellenborough's decision, said: "But as to that *nisi prius* case, if it had been expressly in point, it could not outweigh the solemn decision of Francis v. Rucker. Now, I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that the primary liability is on the acceptor. The liability of the drawer is secondary, and if the drawer is liable so must the acceptor be."[1]

§ 1450. In the United States Supreme Court, the drawee who had instructed the drawer to purchase salt for him, and to draw for reimbursement, was held liable for re-exchange upon ground broad enough to include every case in which there is an authority to draw, or an acceptance.[2] But in this

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Cres. 618 (1829), Lord Tenterden, C. J., saying: "The custom does not give a right to an indorser (against the acceptor) to recover re-exchange."

[1] *In re* General South American Co. 7 Ch. Div. Law R. 645 (1878). See also Walker v. Hamilton, 1 D. F. & J. 502. Prehn v. Royal Bank of Liverpool, Law R. 5 Exch. 92.

[2] Riggs v. Lindsay, 7 Cranch, 500, Livingston, J., saying: "As Lindsay was expressly authorized to draw, he certainly had a right to do so; and whether the defendants accepted his bill or not, so as to render themselves liable to the holders of them, there can be no doubt, that, as between Lindsay and them, it was their duty, and that they were bound in law, to pay them. Not having done so, and Lindsay, in consequence of their neglect, having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered from the moment he drew the bills), it may well be said that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to reimburse Lindsay for the damages, which, by the law of South Carolina, he was compelled to pay, and which may therefore also be considered a part of the debt due by the defendants in consequence of the violation of their promise."

country the decisions generally deny the acceptor's liability.[1] Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it, on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions, and as Thompson has well said: "If the drawer or indorser is liable for such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his breach of contract."[2]

§ 1451. *What laws determine liability of drawer and*

[1] Newman v. Gozo, 2 La. Ann. 642; Hanrick v. Farmers' Bank, 3 Port. (Ala.) 539. In Watt v. Riddle, 8 Watts, 545, the statute of Pennsylvania was held not to include the acceptor as liable for re-exchange. Bowen v. Stoddard, 10 Metc. 377 (1845), Hubbard, J., saying: "In cases where the drawers have been obliged to take up bills, and pay damages, because the acceptors suffered them to be protested when they had funds of the owners in their hands, and were as between themselves and the drawers bound to accept, they may recover such damages of the acceptors, because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that the acceptor as such is liable to pay damages by reason of his acceptance."

[2] Thomson on Bills, 447.

drawee.—The drawer of a bill undertakes that the drawee shall accept, and afterward pay the bill according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow.[1] And so the indorser, who is a new drawer, is liable for damages according to the law of the country where he indorses.[2]

§ 1452. *Damages.*—It results from the doctrine that the indorser is bound only according to the law of the place of indorsement, that several and successive indorsers may be bound to the holder in different amounts of damages. For the holder can only recover damages against the indorser according to the measure allowed by the law of the place of indorsement. And as the indorser can only recover damages against prior parties when allowed, and to the extent allowed by the law of the place of their contracts, it follows that an indorser may be required to pay more to his indorsee than he can recover against such prior parties.[3] Thus, in Maryland, the damages on bills on Europe are fixed at 15 per cent.; in Pennsylvania, at 20 per cent.; and in New York, at 10 per cent. And, for the sake of illustration, let us suppose that at Rio de Janeiro, Brazil, no damages whatever are allowed against the indorser of a bill or note. Now, suppose a bill be drawn by A. in Maryland, in favor of B. in New York, on C. in Liverpool, England, and then indorsed by

[1] Allen v. Kemble, 6 Moore P. C. 314; Gibbs v. Fremont, 9 Exch. 25; 20 Eng. L. & Eq. 555; see §§ 998–9, vol. 1.

[2] Story on Bills, § 153.

[3] 2 Parsons N. & B. 342, 346; Story on Bills, § 153; 2 Kent Com. [*460], 596. See also Wharton Confl. of Laws, § 458.

B. to D. in Rio, and by D. to E. in Pennsylvania, and by E. in Pennsylvania to F. of Liverpool, England. In such case, in the event of dishonor, F., the holder, could recover against A., the Maryland drawer, the 15 per cent. damages; against B., in New York, 10 per cent. damages; against D. in Rio he could recover no damages; and against E. in Pennsylvania he could recover 20 per cent. damages. But suppose, now, the amount, with 20 per cent. damages, be paid by E. in Pennsylvania, he can recover no damages against the indorser in Rio. But he may recover against the Maryland drawer and the New York indorser the amount in full paid by him, with the 20 per cent. damages added; and, superadded, the exchange between Pennsylvania and Maryland or New York, as the case may be. And the Rio indorser, while not bound to the holder for any damages, may recover against the drawer and indorser the principal amount paid, with the damages allowed between Brazil and Maryland or New York, as the case may be. But, by the law merchant, in the absence of any statutory enactment, each indorser is bound to indemnify his successors fully for all damages they have been compelled to pay, as we have already seen.

SECTION IV.

RE-EXCHANGE AND DAMAGES UPON PROMISSORY NOTES.—OTHER CHARGES.

§ 1453. Promissory notes are not, by the law merchant, within the rule entitling the holder to re-exchange, or damages in lieu thereof; but they may be drawn with the express provision that they are to be paid, with exchange on a certain place.[1] And it has been held that, when indorsed, they come within the reason and spirit of the rule; for the indorser of a promissory note is, in effect and in legal contemplation, the drawer of a bill upon a maker, who is regarded as its acceptor, and there is great force in this view.[2]

[1] Pollard v. Herries, 3 Bos. & P. 335; Grutacap v. Woulluise, 2 McLean, 584.

[2] Howard v. Central Bank, 3 Kelly, 375 (1847). The note was made in Georgia, payable in New York. Thomson on Bills, 442-3.

But it does not seem to be in accordance with the doctrines of the law merchant, whose peculiar rules in respect to the subject are confined strictly to bills of exchange.

§ 1454. While, ordinarily, promissory notes do not carry re-exchange, it is the doctrine of the English courts, and of some of the United States authorities, that when an amount is contracted to be paid in a certain State or country (say, for instance, the case of a note made in Virginia for one hundred pounds sterling, payable in London), the creditor ought to recover, wherever his suit may be brought, a sum equal to the debt due, with interest; and also as much as might be necessary to replace the money in the country where it ought to have been paid.[1] This doctrine has been forcibly expressed by Mr. Justice Story, in a case presenting the question,[2] and seems to be, as he has well observed, "founded on the true principles of reciprocal justice," but it has been denied by authorities of great weight.[3]

In a case where the payment was to be in Turkish piastres, but it did not appear where the contract was made or payable, it was held to be the settled rule, "where money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial."[4] But Story says it is impossible to say that a rule laid down in such general terms ought to be deemed of universal application; and cases may easily be imagined which may justly form exceptions.[5]

The measure of damages for conversion of a bill or note is *prima facie* the amount of the note.[6]

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[1] Grant v. Healey, 3 Sumn. 523; Smith v. Shaw, 2 Wash. C. C. 167; Lee v. Wilcocks, 5 Serg. & R. 48; Bank of Missouri v. Wright, 10 Mo. 719; Scott v. Bevan, 2 Barn. & Ad. 78; Cash v. Kennion, 11 Ves. 314; Edwards on Bills, 726–9; 1 Parsons N. & B. 664.

[2] Grant v. Healey, 3 Sumn. 523, Story, J., saying: "But the rate of exchange is not recoverable on a note when the venue is laid in the State where suit is brought, and there is no count or allegation to cover the difference of exchange." Grutacap v. Woulluise, 2 McLean, 581.

[3] Martin v. Franklin, 4 Johns. 124; Day v. Scofield, 20 Johns. 102; Adams v. Cordis, 8 Pick. 260; Lodge v. Spooner, 8 Gray, 166.

[4] Lee v. Wilcocks, 5 Serg. & R. 48.

[5] Story on Bills, § 150.

[6] McPeters v. Phillips, 46 Ala. 496.

§ 1455. It has been held in England that where the acceptor pays a part of the bill, and it is protested as to the residue, or damages in lieu thereof is to be reduced proportionately, and allowed only on the amount unpaid.[1] And this view has been taken in several cases in the United States, it being considered that damages are not given as a liquidated arbitrary mulct, but as compensation for remission of an amount of money which should bear relation to that amount.[2] But it would seem that the drawer contracts that the bill shall be honored, and if not, that he will pay the re-exchange, or damages in lieu thereof, provided by statute, they being as fixed and determinate an obligation as the debt itself.[3] The question may turn in some cases on the construction of the particular statute.

§ 1456. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he be liable to pay it; but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable.[4]

§ 1457. *Provision.*—Besides the re-exchange, the drawer and indorser of a foreign bill which is dishonored, are liable also to the holder, in like manner, for the charges of protest, postage, and provision.[5] "With respect to provision," observes Mr. Chitty, "it is said by Pothier that it is usual for the holder of a bill to allow his agent, to whom he indorses it for the purpose of receiving payment for him, a certain sum of money, called 'provision,' at the rate of so much per cent., to recompense him not only for his trouble, but also, if such agent be a banker, for the risk he runs of losing the money

[1] Laing v. Barclay, 3 Stark. 38; Story on Bills, § 399; Chitty on Bills (13th Amer. ed.) [*687], 768.

[2] Bangor Bank v. Hook, 5 Greenl. 174; Warren v. Combs, 20 Me. 139.

[3] Hargous v. Lahens, 3 San. 21, Sanford, J.: "The liability for damages becomes perfect on the return of the protested bill. A subsequent part payment by the acceptor can have no greater influence than a similar part payment by the drawer or any other party. It is as fixed and determinate an obligation as the debt represented by the sum expressed in the bill itself."

[4] Chitty on Bills [*684].

[5] Chitty on Bills [*684], 765.

which he is obliged to deposit with his correspondents in different places for the purpose of repaying his principal the amount of the money received on the bills. And it is said that one-half per cent. is not an unreasonable allowance.[1] When it is necessary for the holder to send notice by a special messenger, his reasonable expenses are also chargeable upon the parties liable for payment."[2]

§ 1458. Interest is recoverable against all the parties to a bill according to the law of the place where their several contracts were entered into or to be performed. And neither interest, or re-exchange, or damages in lieu thereof, need be specially claimed in the declaration as they flow out of the contract.[3] But charges of protest, postage, and other necessary expenses, can only be recovered upon a special count which covers them.[4] And protest must be alleged in order to the recovery of damages, as they accrue only on the protest.[5]

§ 1458 *a*. Where a certain rate of interest is fixed by law, but a higher rate is permissive by contract, the question often arises as to what rate should be adjudged against the parties bound for payment after maturity of the debt. The better opinion is that the conventional or contract rate should prevail.[6] This is clearly the case where the contract

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[1] Ib. [*688], 770.

[2] Pearson v. Crallan, 2 Smith's Rep. 404; Chitty, Jr. 715.

[3] Bank U. S. v. U. S. 2 How. 711.

[4] Kendrick v. Lomax, 2 Cromp. & J. 405.

[5] Jordan v. Bell, 8 Port. (Ala.) 53.

[6] Cecil v. Hicks, 29 Grat. 1 (1877). In this case the promise ran: "Six months after date to pay to H. or order the sum of $700, with interest at the rate of twelve per centum per annum after date." *Held*, the contract was legal at the time it was made, and was not affected by subsequent abolition of constitutional provision authorizing contracts for twelve per cent., and that that rate of interest continued after maturity. See, to like effect, Seymour v. Continental Life Ins. Co. 44 Conn. 300; Overton v. Balton, 9 Heisk. 762; Pridgen v. Andrews, 7 Texas, 461; Thompson v. Pickel, 20 Iowa, 490; Hand v. Armstrong, 18 Iowa, 324; Hopkins v. Crittenden, 10 Texas, 189; Kohler v. Smith, 2 Cal. 597; Cox v. Smith, 1 Nev. 171; Foulay v. Hall, 12 Ohio, 615; Pruyne v. Milwaukee, 18 Wisc. 568; Morgan v. Jones, 20 E. L. & Eq. 454; see Cromwell v. County of Sac, 6 Otto (96 U. S.), 61. *Contra*, Duran v. Ayer, 67 Me. 145; Eaton v. Boissonault, Id. 540;

to pay the higher rate after maturity is express.[1] Where the rate of interest contracted to be paid is legal, the promisor may bind himself for a higher rate than that which runs by operation of law, to take effect at and continue after maturity as liquidated damages, and the increased rate is not a penalty against which equity will grant relief.[2]

§ 1459. *Costs.*—The owner or indorser who is compelled to pay the bill cannot charge the costs of suit to prior parties, for they arise as well from his breach of contract to pay the bill, as from that of the principal party, and not from his indorsement.[3] But it has been said, that if he is an accommodation party, he may charge to the person accommodated, not only the face of the paper, but the costs of an action against him.[4]

§ 1460. It has been held in California, that damages on bills do not accrue from any stipulation in the contract, but are recoverable by mere operation of law; and that they are therefore a mere incident to the principal sued for, and where the latter cannot be recovered, there can be no claim for the former. If the drawee should pay only the principal sum after dishonor of the bill, the right to demand damages against the drawer having already accrued, the liability of the drawer to pay them would remain. But if the holder surrender up the bill to the drawer, on payment of the principal by him, it would operate as a waiver of all claim for damages, the evidence of the debt being surrendered up and canceled. And where there are two or more of a set of bills, the acceptance of payment of the principal of one would waive damages as to another of the set which had

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Perry v. Taylor, 1 Utah, 63; McComber v. Dunham, 8 Wend. 550; Ludwick v. Hutsinger, 5 Watts & Serg. 51; Henry v. Thompson, Minor, 209; Newton v. Kennerly, 31 Ark. 626; Brewster v. Wakefield, 22 How. 118; but see this case explained in Cromwell v. County of Sac, 6 Otto (96 U. S.), 61.

[1] Eaton v. Boissonault, 67 Me. 540; Cecil v. Hicks, 29 Grat. 1.

[2] Bane v. Gridley, 67 Ill. 388.

[3] Dawson v. Morgan, 9 B. & C. 618; Simpson v. Griffin, 9 Johns. 131.

[4] 1 Parsons N. & B. 663.

been presented, and refused payment, as all of the set constitutes in fact but one bill.[1] The result arrived at in the case cited seems correct; but the view taken that damages do not inhere in the contract is not in consonance with other authorities, nor, as we think, correct.[2]

[1] Page v. Warner, 4 Cal. 395.

[2] See *ante*, § 1423.

CHAPTER XLVI.

LOST AND DESTROYED BILLS AND NOTES.

SECTION I.

DUTIES AND RIGHTS OF THE LOSER, FINDER AND HOLDER OF A LOST NEGOTIABLE INSTRUMENT.

§ 1461. As soon as it is ascertained by the owner that he has lost a bill, note or check, he ought instantly to give notice of the loss to all the parties thereto, and to warn them not to pay the amount to any one but to the loser or his order; and if an unaccepted draft be lost, he should advise the drawee not to accept the same.[1] For if the party liable to pay the amount should pay it at maturity of the instrument, *bona fide* and without notice of the loss to the holder, he discharges the debt, and the loss falls upon the loser, provided the instrument be payable to bearer or indorsed in blank.[2] But the party liable will not be discharged if he pay the amount to the holder of the lost instrument before maturity, such a payment not being in the usual course of business.[3] Nor will he be discharged if he had notice of the loss,[4] unless the holder were a *bona fide* holder for value who could enforce payment.[5] In other words, the loser of a negotiable instrument has no claim on a payor who pays it when he is bound to do so, but generally has such claim when the payor pays it when he is under no compulsion of liability to do so, although without notice of the loss.[6]

[1] Edwards on Bills, 308; Chitty on Bills (13th Am. ed.) [*260], 296.

[2] Lawson v. Weston, 4 Esp. 56.

[3] Da Silva v. Fuller, Chitty on Bills (13th Am. ed.), 296; Wheeler v. Guild, 20 Pick. 545; *ante*, § 1233.

[4] Lovell v. Martin, 4 Taunt. 799.

[5] 2 Parsons N. & B. 256.

[6] Ibid.

§ 1462. *The loser should also immediately notify the public* of the loss or theft of a negotiable instrument, and warn all persons from trading for or negotiating it, by advertisement in the newspapers, by circulation of handbills, and by giving notoriety of the fact through whatever medium he may command. And such notice should describe the lost or stolen instrument in unmistakable terms. In this way the loser may be able to render the circumstance of loss so well known that no banker or other person will trade for the same, and no one become a *bona fide* holder without notice, who could demand payment. But the notice to the public will be unavailing unless it actually reach the holder before he receives the instrument;[1] although advertisement in a paper and general publicity of the fact of loss or theft would be evidence from which knowledge on his part might be presumed by a jury, when coupled with the circumstance of his taking or reading the paper or the like.[2]

§ 1463. *Advertisement of loss not necessary to holder's recovery.*—The law formerly viewed the advertisement of loss by the loser as a condition precedent to his right to recover of those who had taken the instrument, because it considered that if the holder received it negligently he acquired no title against the rightful owner; but, on the other hand, if the owner neglected to advertise the loss, his negligence counterbalanced that of the holder, and the maxim was applied, *potior est conditio possedentis.*[3] But the law on this subject is now entirely changed. Even gross negligence, unless accompanied with fraud or actual notice, does not vitiate the holder's title.[4] And advertisement of the loss by

[1] Beltzhoover v. Blackstock, 3 Watts, 20; Mathews v. Poythress, 4 Ga. 287; Lawson v. Weston, 4 Esp. 56; Byles on Bills (Sharswood's ed.) [*362], 539.

[2] Beckwith v. Corrall, 11 J. B. Moore, 335, where it is said: "If in this case the plaintiff had used due diligence, and had given proper notice of the loss of the bill in question, the defendants might have been presumed to have been apprised of that fact." But see Beltzhoover v. Blackstock, 3 Watts, 20.

[3] Snow v. Peacock, 3 Bing. 411 (11 E. C. L. R.); see Strange v. Wigney, 6 Bing. 677 (19 E. C. L. R.); Beckwith v. Corrall, 11 J. B. Moore, 335; Byles on Bills (Sharswood's ed.) [*361], 538; Chitty on Bills (13th Am. ed.) [*253], 289.

[4] See Chapter XXIV, §§ 774 *et seq.* vol. 1.

the owner is not necessary in any case to his recovery and prior claim against any party who has taken or paid the instrument (except to a *bona fide* holder without notice) with actual notice of the loss.[1] In short the question of the actual holder's paramount right against the world is narrowed now to the single inquiry as to his *bona fides*.[2]

§ 1464. *Loss of instrument no excuse for want of demand, protest, or notice.*—The loss of a bill or note is no excuse for want of a demand, protest or notice, because it does not change the contract of the parties, and the drawer and indorsers will be at once discharged if there be failure in respect of either the demand, protest, or notice.[3] This rule applies whether the bill has been accepted or not; for the loss of the instrument does not relax the duty of the holder to make the demand for acceptance within due season.[4] And it is well settled that demand, protest and notice upon a copy where the original is lost is as effectual as if made upon the original itself.[5] But it does not seem absolutely requisite that any copy should be used.[6]

§ 1465. It is proper, as suggested by Marius, to accompany the protest of a lost bill with an offer of security against its appearance; and he expresses the opinion that if the acceptor refuses payment on such an offer, he will be liable for all damages, including re-exchange and charges.[7] But the better opinion is, that the drawee, or acceptor, has a right to insist on the production of the bill, or legal proof of

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[1] Mathews v. Poythress, 4 Ga. 287; Snow v. Peacock, *supra*. In Louisiana the code requires advertisement of loss as a prerequisite to recovery upon a lost draft or note.

[2] See Chapter XXIV, §§ 774 *et seq.* vol. 1.

[3] *Ante*, § 1173; Thackray v. Blackett, 3 Camp. 164; Blackie v. Pidding, 6 M. G. & S. 196; Chitty on Bills (13th Am. ed.) [*262, 263], 299; Story on Bills, § 348; Edwards on Bills, 304, 305; but see Aborn v. Bosworth, 1 R. I. 401 as to delay.

[4] See *ante*, §§ 1173, 1174.

[5] Hinsdale v. Miles, 5 Conn. 331; Dehers v. Harriott, 1 Show. 163; Thomson on Bills (Wilson's ed.), 204.

[6] 2 Parsons N. & B. 261.

[7] Marius, 80.

its loss in an action with indemnity furnished under supervision of a court before he is obliged to pay it.[1]

Neglect to offer indemnity to the maker or acceptor on demand of payment does not deprive the payee of his right of action, but it will prevent him from recovering costs, and will compel him to bear any special damages resulting from the neglect on his subsequent suit.[2]

§ 1466. In France, it has long been established that the drawer and indorsers of a bill shall be compellable to give the holder of it another of the same tenor, in case the original bill, or the accepted part, has been lost.[3] In England, Mr. Chitty says "no such general rule prevails in the case of inland bills." There is, however, a proviso in the statute of 9 and 10 Will. III, c. 17, sec. 3, by which it is enacted "that in case any such inland bill shall happen to be lost or miscarried within the time limited for the payment of the same, then the drawer of the said bill is, and shall be obliged to give another bill of the same tenor with that first given; the person to whom they are delivered giving security, if demanded, to the drawer to indemnify him against all persons whatsoever, in case the said bills so alleged to be lost or miscarried shall be found again."[4] And the same author adds:[5] "It should seem, that from the word 'such' the statute does not extend to all bills of exchange, but only to the particular bills therein mentioned, namely, such as are expressed to be for value received, and payable after date;[6] but it has been observed that the equity of the statute would comprehend indorsements also, and that the 3 & 4 Anne, c. 9, which gives the like remedies upon notes as were then in use on inland bills, would extend the statute

[1] Thomson on Bills (Wilson's ed.), 204; Chitty (13th Am. ed.) [*263], 299; 2 Parsons N. & B. 262, note *i*.

[2] Farmers' Bank v. Reynolds, 4 Rand. 186; Commercial Bank v. Benedict, 18 B. Mon. 307; Allen v. State Bank, 1 Dev. & B. Eq. 3.

[3] Chitty on Bills (13th Am. ed.) [*263], 299.

[4] Chitty [*263], 300. [5] Ibid.

[6] *Sed quære* (he says); see Walmsley v. Child, 1 Ves. Sen. 346, 347; Leftly v. Mills, 4 T. R. 170; 2 Camp. 215.

of William to notes."[1] It is stated in Byles on Bills that the above quoted provision "is not peculiar to the law of England, but agreeable to the mercantile law of other countries."[2]

§ 1467. "In case of a foreign bill drawn in sets, if one part be lost by the drawee, or be by his mistake given to a wrong person, or otherwise disposed of, so that the holder cannot have a return of the bill, either accepted or not accepted, it is said that the drawee is bound to give to the holder, or to his order, a promissory note for payment of the amount of the bill on the day it becomes due, on the delivery of the second part, if it arrive in time; if not, upon the note; and that if the acceptor refuse to give the note, the holder should immediately protest for non-acceptance, and when due demand the money, though he have neither note nor bill; and that if payment be refused, a protest must be regularly made for non-payment."[3]

§ 1468. The finder of a bill or note acquires no title to a lost bill or note, and the owner upon identifying it, and tracing it to his possession may maintain trover against him.[4] And he may also maintain an action for money had and received for his use, if the finder has received payment of the bill or note.[5] The finder has no lien on the bill or note for his expenses on account of finding the same. But in action upon lost bills such expenses would probably be set off against the owner's claim.[6] When there is no question as to such expenses, he is liable for the full value of the bill or note.[7]

A bailee who tortiously converts a negotiable instrument may be sued either in trover, or for money had and received.[8]

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[1] Powell v. Monnier, 1 Atk. 613; Walmsley v. Child, 1 Ves. Sen. 346; 2 Camp. 215.

[2] Byles (Sharswood's ed.) [*366], 544.

[3] Edwards on Bills, 304, citing Beawes, 188.

[4] Lucas v. Haynes, 1 Salk. 130; Adkin v. Blake, 2 J. J. Marsh. 40; Byles on Bills (Sharswood's ed.) [*365], 543.

[5] Down v. Halling, 4 B. & C. 330. [6] 2 Parsons N. & B. 264, 265.

[7] Holiday v. Sigil, 2 Car. & P. 176. As to rights of finder of bank note, see vol. 2, 580.

[8] Bleaden v. Charles, 7 Bing. 246; Marston v. Allen, 8 M. & W. 494; Garlock v. Geortner, 7 Wend. 198.

And trover lies also against the maker or drawee who wrongfully seizes or detains the note or bill.[1] If the maker wrongfully destroy the note, he may be sued for conversion, and the payee may recover its face value, with interest as damages, notwithstanding it be barred by the statute of limitations.[2]

§ 1469. Although the robber, or finder of a negotiable instrument can acquire no title against the real owner, still if it be indorsed in blank, or payable or indorsed to bearer, a third party acquiring it from the robber, or finder, *bona fide*, for a valuable consideration, and before (but not so, if after)[3] maturity, without notice of the loss, may retain it as against the true owner, upon whom the loss falls, and enforce payment by any party liable thereon; upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.[4] And it is now settled in England and in the United States that even gross negligence on the part of such *bona fide* holder in receiving the instrument does not impair his title, nothing short of *mala fides* impeaching it.[5] Not only does the *mala fide* transferee or holder of a negotiable acquire no right to enforce payment, but the loser may at once hold him liable in an action of trover or assumpsit, or for money had and received.[6] But under a forged indorsement even a *bona fide* holder without notice acquires no title.[7]

[1] Knight v. Legh, 4 Bing. 589; De la Chaumette v. Bank of England, 9 B. & C. 208; Reynolds v. French, 8 Vt. 85; Lamb v. Moberly, 3 T. B. Monroe, 179.

[2] Onthouse v. Onthouse, 20 N. Y. S. C. (13 Hun), 130.

[3] See *post*, §§ 1505, 1506.

[4] Murray v. Lardner, 2 Wall. 710; Chapter XXIV, § 776, vol. 1; Chitty on Bills [*254], 290; see Garvin v. Wiswell, 83 Ill. 216.

[5] See Chapter XXIV, on Rights of Purchaser of Negotiable Instruments, §§ 775 *et seq.* vol. 1; Story on Notes, § 382; Story on Bills, § 416; Chitty (13th Am. ed.) [*254, 255], 291–294.

[6] Clarke v. Shea, 1 Cow. 197; Smith v. Braine, 16 Q. B. 244; Mason v. Waite, 17 Mass. 560; Henderson v. Irby, 1 Speers, 43.

[7] Colsen v. Arnot, 57 N. Y. 253, vol. 1, § 677; Graves v. American Exchange Bank, 17 N. Y. 205.

§ 1470. Some doctrines of evidence remain to be stated. The legal presumption is that the holder of a note is not a finder, but a *bona fide* transferee for value.[1] When, however, the loss by the original owner is proved, the burden of proof shifts, and the holder must show that he acquired it *bona fide* for value.[2]

§ 1471. The original existence, genuineness, identity, and loss or destruction of the instrument must be proved, if disputed in a suit against the maker, otherwise a copy will not be received in evidence.[3] And if evidence of destruction is not conclusive, the plaintiff must generally show that diligent search has been made for it in those places where if existing it would be most likely to be found.[4] The loss where alleged can seldom be proved by "direct and positive evidence," and therefore must, in almost all cases, be made out by circumstances.[5] "As it is generally occasioned by negligence, it is seldom capable of being given."[6] The courts will be less exacting as to the measure of proof of loss or destruction, where the maker is safe against any future claim of a *bona fide* transferee;[7] and more exacting where the circumstances are suspicious as against the plaintiff's claim, or the maker is not so protected and safe. Where the note is not negotiable the proof need not be so strong as where it is negotiable.[8] Is not necessary for a creditor to show that a debt evidenced by a lost paper is not paid.[9]

§ 1472. *The plaintiff's affidavit* addressed to the court is admissible to prove the loss of a bill or note, and to lay

[1] King v. Milsom, 2 Camp. 5; *ante*, § 812, vol. 1.

[2] See Chapter XXIV, on Rights of Bona Fide Holder or Purchaser, Sec. VII. vol. 1.

[3] Farmers' Bank v. Reynolds, 4 Rand. 186; Palmer v. Logan, 3 Scam. 56; Grimes v. Talbot, 1 A. K. Marsh. 205; Jackson v. Jackson, 6 Dana, 257.

[4] Palmer v. Logan, 3 Scam. 56; Herndon v. Givens, 16 Ala. 261; Viles v. Moulton, 11 Vt. 470; Foster v. Mackay, 7 Metc. 531.

[5] Holiday v. Sigil, 2 Car. & P. 176; Greenstreet v. Carr, 1 Camp. 251; Lewis v. Petayvin, 16 Mart. 4.

[6] Walmsley v. Child, 1 Vesey, Sr. 341.

[7] Swift v. Stevens, 8 Conn. 431.

[8] Nagel v. Mignot, 8 Mart. (La.) 488.

[9] Bell v. Young, 1 Grant's Cases, 175.

the foundation for secondary evidence of its contents. And the question of loss or destruction is in general for the court, and not the jury. In many of the States there are statutory regulations on this subject, and to them and the adjudicated cases interpreting them reference should be made in any particular case. A duplicate protest may be offered in evidence, without producing the original bill, when it is proved to have been lost after protest.[1] And so may a duplicate notarial copy of the bill when the loss has been proved.[2] In respect to a note, it has been held that the notarial copy is not necessary as primary evidence of its contents when lost.[3] The copy of lost bill or note sued on must be a full copy as to all parties.[4] It will not be presumed, but must be affirmatively shown, that the lost instrument was negotiable.[5] Neither an acknowledgment of the debt, or a promise to pay it, dispenses with necessity of producing the instrument, or accounting legally for its absence; for they import no more than the instrument itself, that is, an obligation to pay upon proper voucher or indemnity.[6]

§ 1473. *In the case of a bill or note lost after suit brought at law*, the court is not ousted of its jurisdiction,[7] but the plaintiff may recover as in other cases of lost notes.[8] It will not be necessary for the plaintiff to offer indemnity against future liability, but the court, if asked, will stay execution until indemnity is furnished.[9] In the case of a note which

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[1] Usher v. Gaither, 2 Harris & McH. 457.

[2] Wright v. Hancock, 3 Munf. 521; 2 Parsons N. & B. 307.

[3] Renner v. Bank of Columbia, 9 Wheat. 581.

[4] Bond v. Whitfield, 32 Ga. 215.

[5] Wright v. Wright, 54 N. Y. 437; Lazell v. Lazell, 12 Vt. 443; Hough v. Barton, 20 Vt. 455; Youngling v. Kohlkass, 18 Md. 148; McNair v. Gilbert, 3 Wend. 344; Pintard v. Tackington, 10 Johns. 104; Edwards, 296, 302.

[6] Vanauken v. Hornbeck, 2 Green (N. J.) 178; Story on Notes, § 450.

[7] Bliss v. Covington, 9 Dana, 265; 2 Parsons N. & B. 309; *contra*, Chitty on Bills (13th Am. ed.) [*266], 303.

[8] Abbott v. Striblem, 6 Iowa, 191; Jones v. Fales, 5 Mass. 101; Jacks v. Darrin, 3 E. D. Smith, 548; Weston v. Hight, 17 Me. 287; Renner v. Bank of Columbia, 9 Wheat. 581; Brown v. Messiter, 3 Maule & S. 281; Clarke v. Quince, 3 Dowl. 26; 2 Parsons N. & B. 309.

[9] Bisbing v. Graham, 14 Penn. St. 14.

had been lost, and a copy sued on—but was found before the trial, and there produced—it was held that the suit at law could be sustained, though no indemnity was offered.[1]

Where a lost note was found before trial of an action at law, and it appeared that it was lost at the time of demand and notice, but this was not known to any of the parties, and no indemnity was tendered, it was held that recovery could be had against maker and indorser.[2]

§ 1474. When a debtor remits his creditor a bill or note by post or otherwise, of his own motion, and it be lost or stolen, it is his own risk and loss; but if done by the creditor's direction, the loss falls on him.[3]

SECTION II.

SUIT AGAINST PARTIES TO A LOST NEGOTIABLE INSTRUMENT.

§ 1475. The owner who has lost a negotiable instrument, and has duly fixed the liability of the parties thereto by regular demand, protest, and notice, where they are necessary, may undoubtedly enforce payment by legal proceedings against such parties. But the authorities are not in harmony as to the proper form of procedure. In England where the line of demarcation between legal and equitable jurisdiction is well defined, and strictly observed, it is well settled that the remedy upon a lost negotiable instrument can be sought only in a court of equity; which alone can require the plaintiff to secure the defendants by execution of sufficient indemnity, and administer fully the equities between the parties. If the instrument be payable to bearer, or indorsed in blank, it is obvious that it might reach the hands of a *bona fide* holder for value, without notice of the loss; and that if the parties liable were compellable to pay the amount thereof to the owner in a suit at law, without indemnity,

[1] Smith v. Rockwell, 2 Hill, 482, Nelson, C. J.

[2] Gilbert v. Dennis, 3 Metc. 495.

[3] Warwick v. Noakes, Peake N. P. 67; see *ante*, § 287, vol. 1.

such parties might, without the slightest negligence on their part, be forced to pay it a second time to such *bona fide* holder. The courts of law which proceed in accordance with established, and unbending forms do not possess the elastic machinery necessary to require the owner to make suitable indemnity against the loss which might thus occur, or the lesser loss produced by defending a suit brought by a party in actual possession of the instrument. And therefore such cases are remitted to the exclusive cognizance of courts of equity.[1]

§ 1476. It is said also, that in strict law the defendant is entitled to the instrument on payment thereof, as his voucher of discharge, as he only covenanted to pay its value on its presentment.[2] And it is intimated to be an exercise of equitable jurisdiction to permit a recovery without its production. But the inability of courts of law to provide indemnity is the main ground of requiring a resort to equity.[3] When suit is brought against the indorser of lost bill or note, the reasons for requiring a resort to equity apply with peculiar force.[4]

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[1] Hansard v. Robinson, 7 B. & C. 90; Wain v. Bailey, 10 Ad. & El. 616; Price v. Price, 16 M. & W. 232; Pierson v. Hutchinson, 2 Camp. 211; Davis v. Dodd, 4 Taunt. 602; Mossop v. Eadon, 16 Ves. 430; Powell v. Roach, 6 Esp. 76; *Ex parte* Greenway, 6 Ves. Jr. 812; Mayor v. Johnson, 3 Camp. 324; Crowe v. Clay, 9 Exch. 604; Rolt v. Watson, 12 J. B. Moore, 510; Powell v. Roach, 6 Esp. 76; Wright v. Maidstone, 1 Kay & J. 701; Kirby v. Sesson, 2 Wend. 551; Lazell v. Lazell, 12 Vt. 443; 2 Parsons N. & B. 288–9, 296; Story on Notes, §§ 445–450; Story on Bills, § 448; Chitty on Bills (13th Am. ed.) [*265], 301; (Brown v. Messiter, 3 Maule & S. 281; Glover v. Thompson, Ry. & M. 403; and Glynn v. Bank of England, 2 Ves. Sr. 38, are overruled.)

[2] Hansard v. Robinson, 7 B. & C. 90; Hilder v. Seelye, 8 Barb. 408.

[3] 2 Pars. N. & B. 289; *Ex parte* Greenway, 6 Ves. Jr. 812.

[4] In Story on Promissory Notes, where the English doctrine is approved (see § 448), it is said: "When we come to the case of the indorser, who is called upon to pay the note, in default of payment by the maker, it will be difficult to find any solid reason, upon which the holder can be entitled to recover against him, without the note being produced, upon any mere parol proof of the loss of it; since the indorser may or must thereby be put to great embarrassment in making out his own title against the maker, or against other parties, liable to him, without the production of the note. What right can the holder have, to shift upon him the burden of proving the loss of the note? Or

§ 1477. A distinction was attempted to be established at one time, in England, between the case of loss of the bill or note before it was due, and the loss of it after it had become overdue; it being contended that in the latter case, as the *bona fide* holder could only acquire it subject to all the equities between antecedent parties, the very circumstance of its staleness being constructive notice of defect of title, the owner should be entertained in a suit at law, without giving indemnity. But the contrary doctrine is well settled. For, although a bill or note ceases to be negotiable, in the most enlarged sense of that term, at its maturity, it still passes from hand to hand by indorsement or delivery; the actual holder is always presumed to have acquired it before maturity; a court of law cannot judge whether an indemnity is, or is not, sufficient; and, although the defendant may have a good defense against the subsequent holder, he may be put to risk, trouble and expense in establishing it. And the courts of equity therefore maintain exclusive jurisdiction, even when the instrument has been lost overdue.[1]

§ 1478. In the United States the decisions of the courts vary. In Massachusetts it has been held that an action can be maintained at law against the parties to a negotiable note lost before maturity, the court considering the idea that a court of law could not order or judge of the sufficiency of an indemnity "rather ideal than solid;" and that the objection that the action at law would not lie, because protest of the instrument could not be made, as equally applicable in a court of equity.[2] There is undoubtedly great force in the

what adequate means can he have of preserving and commanding all the proof for future use, in case of future litigation? The English doctrine must, under such circumstances, apply to the indorser with double propriety and force." Tuttle v. Standish, 4 Allen, 481.

[1] Hansard v. Robinson, 7 Barn. & C. 90; Story on Notes, § 450; Story on Bills, § 307; Chitty on Bills (13th Am. ed.) [*266], 303; Byles on Bills (Sharswood's ed.) [*363], 541.

[2] Fales v. Russell, 16 Pick. 315. To same effect, see Union Bank v. Warren, 4 Sneed, 167; Meeker v. Jackson, 3 Yeat. 442; Bullet v. Bank of Pennsylvania, 2 Wash. C. C. 172; Anderson v. Robson, 2 Bay, 495; Bridgeford v. Masonville Co. 34 Conn. 546; Nagel v. Mignot, 7 Mart. (La.) 657; S. Id. 488; Brent v.

reasoning of this decision; but, we think, the weight of authority and reason are both against it. And in those States where the distinction between law and equity is well preserved, the law may be regarded as settled to the contrary, in accordance with the English precedents.[1] In some of the States the distinction between negotiable instruments lost before, and those lost after maturity, is recognized; and where lost after maturity, the right to an action at law, without making an indemnity, is maintained.[2] But the better opinion, sustained by high authority, is that the distinction is not well taken, and that equity must be resorted to.[3]

§ 1479. The like rule, that an action at law is not maintainable, has been applied in England where bills and notes, and bank notes (which are more frequently transmitted in halves), are divided and transmitted by post, and one-half is lost and the other half arrives in safety. In such cases it has been considered that the holder of one-half cannot recover at law, because the other half may have passed into the hands of another *bona fide* holder.[4] But the contrary view seems more reasonable, because the party who takes a half instrument does not acquire the whole, but only a part,

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Ervin, 15 Id. 303; Lewis v. Petayvin, 16 Id. 4; Bean v. Keen, 7 Blackf. 152; Welton v. Adams, 4 Cal. 37; Robinson v. Bank of Darien, 18 Ga. 65, 111; Commercial Bank v. Benedict, 18 B. Mon. 307; Freeman v. Boynton, 7 Mass. 483; Page v. Page, 15 Pick. 368; Willis v. Cresey, 17 Me. 9.

[1] Moses v. Trice, 21 Grat. 556; Rowley v. Ball, 3 Cow. 303 (1824); Posey v. Decatur Bank, 12 Ala. 802; Morgan v. Reintzel, 7 Cranch, 273; Hinsdale v. Bank of Orange, 6 Wend. 378; Thayer v. King, 15 Ohio, 242; Swift v. Stevens, 8 Conn. 431; Aborn v. Bosworth, 1 R. I. 401; Edwards v. M'Kee, 1 Mo. 123; Wofford v. Board of Police, 44 Miss. 579; Story on Notes, § 448; Story on Bills, § 348; Edwards on Bills, 295; 2 Parsons N. & B. 297, 298.

[2] Thayer v. King, 15 Ohio, 242; Smith v. Walker, 1 Smed. & M. 432; Jones v. Fales, 5 Mass. 101; Chaudron v. Hunt, 3 Stew. 31; Brent v. Ervin, 7 Mart. (La.) 518.

[3] Moses v. Trice, 21 Grat. 556; Rowley v. Ball, 3 Cow. 303; Chewning v. Singleton, 2 Hill, 371; Lazell v. Lazell, 12 Vt. 443; Hopkins v. Adams, 20 Vt. 407; Story on Notes, §§ 446, 450; Edwards on Bills, 297; see *ante*, § 1477.

[4] Mayor v. Johnson, 3 Camp. 324; Byles on Bills (Sharswood's ed.) [*365], 543; 1 Parsons N. & B. 231; Farmers' Bank v. Reynolds, 4 Rand. 168; Bank of Va. v. Ward, 6 Munf. 169; Story on Bills, § 448; see Chapter L, on Bank Notes, Sec. VI, *infra*.

which imposes inquiry upon him and opens all equitable defenses; and it has prevailed in the United States, the severed note being placed on the same footing as one destroyed.[1]

Notwithstanding these views, equity is generally admitted to have jurisdiction of lost instruments, even where there is concurrent jurisdiction at law.[2]

§ 1480. *Tender of indemnity before payment can be required.*—The parties liable upon a bill or note are entitled to its production and surrender before payment; but, as this is physically impossible when it has been lost, the owner should, and must, tender a sufficient indemnity in some form against any future claim, by a finder or holder, upon the lost instrument.[3] This indemnity is not, in the nature of things, as adequate a protection as the delivery of the instrument to the payor, but it approximates it as nearly as practicable. And it should be offered to every party of whom payment is demanded. The indorser and drawer should be tendered indemnity as well as the maker and acceptor of a lost note or bill, because as the principals are not bound to pay without production of the instrument, or indemnity in case of loss, for that very reason payment ought not to be required of the drawer or indorser till the proper steps have been taken to secure them recourse against their principals. Besides, the indorser's and drawer's own liability upon the paper demands indemnity to himself, which should be given

[1] Bank of U. S. v. Sill, 5 Conn. 106; Hinsdale v. Bank of Orange, 6 Wend. 378; Martin v. Bank of U. S. 4 Wash. C. C. 253; Bullett v. Bank of Pennsylvania, 2 Id. 172; Armat v. Union Bank, 2 Cranch C. C. 180; Allen v. State Bank, 1 Dev. & B. Eq. 1; Bank of Va. v. Ward, 6 Munf. 169; 2 Parsons N. & B. 312, 313; Redfield & Bigelow's Lead. Cas. 706; Edwards, 307; See Chap. L, Sec. VI.

[2] Farmers' Bank v. Reynolds, 4 Rand. 186; Bank of Va. v. Ward, 6 Munf. 166; Allen v. State Bank, 1 Dev. & B. Eq. 3; Stout v. Ashton, 5 T. B. Monr. 251; Smith v. Walker, 1 Smed. & M. Ch. 432; Irwin v. Planters' Bank, 1 Humph. 145; Jackson v. Jackson, 6 Dana, 257; *Ex parte* Greenway, 6 Ves. Jr. 812; Mossop v. Eadon, 16 Ves. 433; Davis v. Dodd, 4 Taunt. 602.

[3] Fisher v. Carroll, 6 Ired. Eq. 485; Meeker v. Jackson, 3 Yeat. 442; Freeman v. Boynton, 7 Mass. 483; Donelson v. Taylor, 8 Pick. 390; Fales v. Russell, 16 Pick. 315; Almy v. Reed, 10 Cush. 421; 2 Parsons N. & B. 302; Edwards on Bills, 304.

without delay, so that he may be in a situation to pay the demand at any time after notice, and look to the maker or acceptor.[1]

§ 1481. *Exceptions as to indemnity.*—The rule requiring indemnity is applied by the courts of law, in which actions upon lost instruments are considered maintainable, as well as by courts of equity. But there are some cases in which the defendant can run no risk, and in which the plaintiff is therefore entertained in a court of equity or law without giving a bond of indemnity; that is, (1) where the note is not negotiable;[2] and the note will not be presumed to be negotiable in the absence of proof;[3] (2) where though negotiable, it is payable to order and unindorsed, or has been specially indorsed;[4] (3) where the instrument is clearly shown to have been destroyed;[5] (4) where the lost instrument has been traced to the defendant's custody;[6] and (5) when it is shown that the defendant is protected by the statute of limitations against future liability.[7] In Louisiana it has been held that no indemnity

[1] Smith v. Rockwell, 2 Hill, 484 (1842). Nelson, C. J.: "Tender of indemnity should be made to both maker and indorser at the time of demand and notice, because, as the former is not bound to make payment without the production of the note, or indemnity in case of loss, for that very reason payment ought not to be required of the latter till the proper steps have been taken to secure his immediate recourse against his principal. Besides, the indorser's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in situation to pay the demand at any time after notice, and look to the maker. Any prejudice he might suffer by reason of neglect on the part of the holder to give the necessary indemnity in either case, would, no doubt, afford ground for refusing to enforce payment against him on application to a court of equity for that purpose. The holder, therefore, should take the necessary steps with all reasonable diligence to secure a speedy resort to that court in behalf of the surety, as the consequences of delay would justly fall upon the holder, so far as the indorser, or any other party standing in that relation upon the paper, is concerned." Wilder v. Seelye, 8 Barb. 410; Edwards on Bills, 305.

[2] Clark v. Reed, 12 Smed. & M. 554; Lazell v. Lazell, 12 Vt. 443; 2 Parsons N. & B. 303; Wright v. Wright, 54 N. Y. 437.

[3] Wright v. Wright, 54 N. Y. 437.

[4] See *post*, § 1484, note; Hopkins v. Adams, 20 Vt. 407; Lazell v. Lazell, 12 Vt. 443.

[5] See *post*, § 1482. [6] See *post*, § 1483. [7] See *post*, § 1845.

will be required when it has been proved that the instrument was protested and returned to the plaintiff, because an indorsee would palpably acquire it subject to all precedent equities.[1] But this is against the better doctrine elsewhere stated.[2]

Professor Parsons, after stating the general principles of the subject, observes:[3] "In short, the American rule upon indemnity is simply that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then. It has, nevertheless, in some jurisdictions been thought best, upon the whole, to require indemnity in all cases, whether the note be alleged to be lost or destroyed, notwithstanding its occasional hardship and inconvenience."[4]

In Massachusetts, where the maker of a lost negotiable note may be sued at law, indemnity being given, an indorser cannot be likewise sued, the distinction being taken that a bond of indemnity will not sufficiently protect him as it would the maker; and the plaintiff is therefore required to resort to equity.[5]

§ 1482. *Exceptions to the general rule as to suit at law.* —The rule is different as to non-negotiable instruments, parties to which may be sued at law, and no indemnity is necessary. And there are several exceptions to the rule denying the right to sue at law when the lost instrument is negotiable. *First:* When the lost negotiable paper is proved to have been destroyed, for in that case it can never rise in judgment against the defendants. This view obtains

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[1] Brent v. Ervin, 15 Mart. (La.) 303; see 3 Mart. N. S. 303; 7 Mart. 518.

[2] See *ante*, §§ 1477–8.

[3] 2 Parsons N. & B. 304.

[4] Welton v. Adams, 4 Cal. 37; Price v. Dunlap, 5 Id. 583; Wade v. New Orleans &c. Co. 8 Rob. (La.) 140.

[5] Tuttle v. Standish, 4 Allen, 481. Hoar, J., delivered the opinion of the court, explaining and qualifying Jones v. Fales, 5 Mass. 101, and Renner v. Bank of Columbia, 9 Wheat. 581.

now both in the United States[1] and in England,[2] although at one time in the latter country the doctrine prevailed that, notwithstanding the alleged destruction of the instrument, equity should be resorted to[3] for the several reasons: (1) that because he who pays a bill or note is entitled to receive it back as a voucher; (2) because it may have been negotiated before its destruction, and have become the property of another; and (3) because (as stated by Story)[4] "evidence which is merely presumptive may be offered of the destruction of the note, and then it may expose the maker to all the inconveniences of a subsequent second payment, if the note should subsequently reappear." But if it be shown that the plaintiff himself destroyed the note or bill, this right to recover would be affected. If done deliberately and voluntarily, he could not recover at all;[5] but if done by accident or mistake—of which clear proof should be required—he would then be entitled to recover.[6]

§ 1483. *Second:* If the bill or note, payable to order, and indorsed in blank, or payable to bearer, be traced to the defendant's possession after its loss, then the action at law would lie, because it could then never be negotiated save by his fault, and there would be no just ground for his demanding an indemnity.[7] In such a case it would not be necessary

[1] Hinsdale v. Bank of Orange, 6 Wend. 378; Moore v. Fall, 42 Me. 450; Des Arts v. Leggett, 16 N. Y. 582; Thayer v. King, 15 Ohio, 242; Bank U. S. v. Sill, 5 Conn. 106; Moses v. Trice, 21 Grat. 556; Hough v. Barton, 20 Vt. 455; Patton v. State Bank, 2 Nott & McC. 464; Branch Bank v. Tillman, 12 Ala. 214; Dean v. Speakman, 7 Blackf. 317; Wade v. Wade, 12 Ill. 89; Aborn v. Bosworth, 1 R. I. 401; 2 Parsons N. & B. 293, 294; Wells v. Wade, 20 Kansas,

[2] Wright v. Maidstone, 1 Kay & J. 701; Woodford v. Whitely, Moody & M. 517; Clarke v. Quince, 3 Dowl. 26; Blackie v. Pidding, 6 Com. B. 196; Pierson v. Hutchinson, 2 Camp. 211; Chitty on Bills (13th Am. ed.) [*267, 268], 305; Chitty, Jr. 776; 2 Parsons N. & B. 292–295.

[3] Hansard v. Robinson, 7 B. & C. 90, Lord Tenterden.

[4] Story on Notes, §§ 107, 108, 448.

[5] Angel v. Felton, 6 Johns. 149; Van Auken v. Hornbeck, 2 Green (N. J.), 178; Fisher v. Mershon, 3 Bibb, 527; Blade v. Noland, 12 Wend. 173; 2 Parsons N. & B. 293; Edwards on Bills, 303.

[6] Clarke v. Quince, 3 Dowl. 26.

[7] Smith v. McClure, 5 East, 476; Knight v. Legh, 4 Bing. 589; Paterson v.

to notify the defendant to produce the paper, but simply to substitute a copy for it, and sue at law.[1] Equity, it has been held, would have no jurisdiction under such circumstances, as there would be a complete and adequate remedy at law.[2] Instead of suing the defendant upon the instrument itself, the plaintiff might sue in trover for its possession.[3] Thus, where the plaintiff placed a bill of exchange in his attorney's hands for collection, and it was left on his office table, and there was circumstantial evidence that the acceptor had abstracted it, it was left to a jury, after notice given to produce it, to say whether or not such was the case, and to give a verdict for the plaintiff without production of the bill.[4]

§ 1484. *Third:* When the instrument is not payable to order or to bearer, or is payable to order and is unindorsed by the payee, or has been indorsed in full to a particular person (and remains unindorsed in blank or to bearer by the indorsee), for in such a case no legal title could pass so as to invest any one with the privileges of a *bona fide* holder in the usual course of business, and no indemnity would be necessary.[5] In England, this view, which obtains in the United States, was at one time adopted,[6] but was subse-

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Hardacre, 4 Taunt. 114; De la Chaumette v. Bank of England, 9 B. & C. 208; 2 B. & Ad. 385; Decker v. Mathews, 2 Kern. 313; Murray v. Burling, 10 Johns. 172; Lamb v. Moberly, 3 T. B. Mon. 179; Buck v. Kent, 3 Vt. 99; Edwards on Bills, 303; Chitty (13th Am. ed.) [*265], 301; 2 Parsons N. & B. 293.

[1] Garlock v. Goertner, 7 Wend. 198; McLean v. Hertzog, 6 S. & R. 154; Robinson v. Curry, 6 Ala. 842; Burton v. Payne, 2 Car. & P. 520; Bucher v. Jarratt, 3 B. & P. 143.

[2] Cooke v. Darwin, 18 Beav. 60.

[3] Howe v. Hale, 14 East, 274.

[4] Smith v. McClure, 5 East, 477.

[5] Rowley v. Ball, 3 Cow. 303; Pinterd v. Tackington, 10 Johns. 104; Branch Bank v. Tillman, 12 Ala. 214; Rogers v. Miller, 4 Scam. 333; Dean v. Speakman, 7 Blackf. 317; Depew v. Wheelan, 6 Blackf. 485; Moore v. Fall, 42 Me. 450; Price v. Dunlap, 5 Cal. 483; Cleveland v. Worrell, 13 Ind. 545; Hough v. Barton, 20 Vt. 455; Mossop v. Eadon, 16 Ves. 430; Long v. Bailie, 2 Camp. 214; 2 Parsons N. & B. 289–291; Edwards on Bills, 302; Chitty (13th Am. ed.), 305.

[6] Ralt v. Watson, 4 Bing. 273; 11 J. B. Moore, 510; Long v. Bailie, 2 Camp. 214.

quently overruled, and the right of action at law confined to those cases in which the instrument was never negotiable.[1]

§ 1485. *Fourth:* When the debt, at the time of contesting the action at law, would be barred by the statute of limitations, if a third party were to demand payment of the instrument, it is said that then also the action at law would be sustainable, because the defendant would not be exposed to danger.[2]

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[1] Ramuz v. Crowe, 1 Exch. 167, overruled in Clay v. Crowe, 8 Exch. 295, but re-established in Crowe v. Clay, 9 Exch. 604.

[2] Moore v. Fall, 42 Me. 450; Torrey v. Foss, 40 Me. 74; 2 Parsons N. & B. 296, 303.

BOOK VI.

VARIETIES OF NEGOTIABLE INSTRUMENTS OTHER THAN BILLS AND NOTES.

CHAPTER XLVII.

COUPON BONDS.

SECTION I.

DEFINITION AND NATURE OF COUPON BONDS.

§ 1486. The inventive spirit of modern finance and commerce, stimulated by the prodigious strides of internal improvements, has thrown into circulation a new species of security for money which has sprung at once to the front rank of negotiable instruments. This security is styled a "coupon bond." It is issued by the Federal Government, by States,[1] by municipalities, by railroad, canal and steamboat companies, and all manner of trading corporations. A vast portion of the wealth of the country is represented in "coupon bonds." The reports of all the courts have been filled for the last ten years with decisions respecting their nature and uses. Every banker, merchant, capitalist, and business man is deeply interested in the law concerning them; and we shall endeavor here to summarize the settled principles which control their issue and negotiation.

[1] See Chapter XVI, on The Federal and State Governments as Parties to Negotiable Instruments, Vol. I, p. 330.

§ 1487. *It seems that individuals, as well as corporations and States, may execute negotiable coupon bonds.*—Since the seal does not affect the negotiability of such securities issued by corporations and States, there is no reason why the same principle should not be extended to them when issued by individuals. In a recent New York case, in the United States District Court, where individual coupon bonds were in suit, Blatchford, J., said: "I think that on the authority of the decision of the highest courts of this State, and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual under his seal, and not by a corporation, and are not specialties so as to make them subject, in the hands of their assignee, to equities existing against their assignor. Although under seal, they were issued as shown on their face, to secure the payment of money on time; and they contain on their face expressions showing that they are expected to pass from one to another by delivery. Therefore, the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name.[1] Such bonds and their coupons pass by delivery; a purchaser of them in good faith is not affected by want of title in their vendor, and the burden of proof on a question as to such good faith lies on the party who assails the possession. The evidence in this case shows that the Union Square National Bank became, to all substantial intents, the purchaser of these bonds and coupons in good faith for a full and fair consideration, in the usual course of business, and without notice of any possible defect in the title of their assignor. These views proceed on the assumption that the claim of the bank will absorb all dividends on the bonds and coupons, and apply only to the interest of the bank therein. If there shall be a surplus beyond paying the claim of the bank, questions as to the title and position of their assignor may become material."[2]

[1] Citing Brainard v. New York & Hudson River R. R. Co. 25 N. Y. 496; White v. Vermont R. R. Co. 21 How. 575; Mercer County v. Hacket, 1 Wall. 83.

[2] Simeon Leland in Bankruptcy, 6 Ben. 175.

§ 1488. A *coupon bond* is an instrument complete in itself, and yet composed of several distinct instruments, each of which is in itself as complete as the whole together. As originally issued, the "coupon bond" consists of—(1) an obligation to pay a certain amount of money at a future day: and (2), annexed to it is a series of coupons, each one of which is a promise for the payment of a periodical installment of interest. The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond, by separating and presenting the proper coupon; and it also enables him to anticipate his interest by negotiating the coupon, which represents it, to another person, at any time before its maturity.

§ 1489. The term "coupon" is derived from the French "*couper*—to cut," and it is defined by Worcester, in his Dictionary, to signify "one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made; so called, because it is *cut off* when it is presented for payment." This is a succinct and clear definition, and indicates the design of the coupons. They are furnished as attached to the bond as evidence of successive periodical liabilities. They may be severed and negotiated before the maturity of the interest they represent, and thus pass as separate and independent securities,[1] like other commercial instruments. For in whosesoever hands they are, they are evidence of title to demand the interest on the bond, and they serve the purpose of vouchers when the interest is paid; but the contract to pay the interest is in the bond. Yet so intimate is the relation

[1] Arents v. Commonwealth, 18 Grat. 776; Clark v. Iowa City, 20 Wall. 584; Commissioners of Knox County v. Aspinwall, 21 How. 539; Thomson v. Lee County, 3 Wall. 327; Beaver County v. Armstrong, 44 Penn. 63; Clarke v. Janesville, 10 Wis. 136; Maddox v. Graham, 2 Metc. (Ky.) 56; Rose v. City of Bridgeport, 17 Conn. 243; Brainard v. N. Y. & H. R. R. 25 N. Y. 496; Railway v. Clencay, 13 Ind, 161; Evertsen v. National Bank of Newport, 11 N. Y. S. C. (4 Hun), 694; 5 Robinson's Practice, 238; Spooner v. Holmes, 102 Mass. 503; National Exch. Bank v. Hartford R. R. Co. 8 R. I. 375.

between it and the coupons, that legislative authority to issue bonds implies authority to issue coupons attached to them for interest.[1] "Coupons are substantially a minute repetition of what is contained in more concise terms in the bond. They are attached to the bond to be separated therefrom at the convenience of the holder, and to be thereafter negotiated as money, or the representative of money by simple delivery."[2]

§ 1490. Coupons are more closely assimilated to promissory notes than to bank notes, bills of exchange, or checks, although in their formal wording they may sometimes less resemble them.

It is obvious from their nature and purpose that they are not intended for indefinite circulation like bank notes. They are made to facilitate the prompt payment of interest, and by no means designed to become a part of the currency of the country, although sometimes made use of as a substitute for money.

Therefore, even when drawn in the form of checks upon banks, they are regarded as due on the very day fixed for payment, and not as payable on demand like bank notes.[3] Nor are they like checks, which must be presented to the bank before the drawer can be sued, even when worded like them. They are the primary engagements of their payor, and if payable at a bank, they are simply like notes so payable; if sued upon without previous presentment at the bank, the defendant may show that there were funds to meet them, but otherwise must stand suit.[4] Nor are coupons like bills of exchange, from which they differ in several distinctive respects: (1) They are not intended for acceptance when drawn upon a bank or banking house. (2) They are not entitled to grace.[5] (3) In short, they are simply in

[1] Arents v. Commonwealth, 18 Grat. 773.

[2] Evertsen v. Nat. Bank, 11 N. Y. S. C. (4 Hun), 569.

[3] Arents v. Commonwealth, 18 Grat. 750.

[4] Virginia & Tenn. R. R. Co. v. Clay, MSS. Special Court of Appeal of Va.

[5] Arents v. Commonwealth, 18 Grat. 773. *Contra*, Evertsen v. Nat. Bank, 66 N. Y. (22 Sickels), 18; 11 N. Y. S. C. (4 Hun), 692. See §§ 1505, 1506.

effect promissory notes payable on the very day of their maturity without grace. It has, however, been recently held in New York, that coupons are entitled to grace like other commercial paper, in a case directly presenting that question; so that judicial views of that point are now contradictory.[1] As the coupons are mere separable fragments of the bond, we think the text contains the better view.

§ 1491. Bonds and coupons, though designed to circulate as marketable commodities, are not bills of credit within the meaning of the United States Constitution.[2]

A coupon is part of the debt covered by the mortgage which secures its bond, and the security of the mortgage inures to the assignee of the coupon.[3] All of the same series of bonds secured by a mortgage share ratably in the proceeds, and their holders should be paid *pari passa*, without regard to the amounts they paid for the bonds.[4] In New York, it has been held, that the interest coupons upon the

[1] Evertsen v. Nat. Bank, 66 N. Y. (22 Sickels), 22 (1876), Allen, J.: "It is probably true that they are regarded and treated, as well by promisor as promisee, as payable at the day, and paid as if in terms payable without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons, they could not be transferred so as to give a good title." See Cooper v. Town of Thompson, 13 Blatchf. 434, and Jones on R. R. Securities, § 323.

[2] McCoy v. Washington County, 3 Wall. Jr. 386.

[3] Miller v. Rutland, &c. R. R. 4 Vt. 399; County of Beaver v. Armstrong, 44 Penn. 63; Haven v. Grand Junction R. R. Co. 109 Mass. 88; Union Trust Co. v. Monticello, &c. R. R. 63 N. Y. 314.

[4] *In re* Regent's Canal Iron Works Co. 3 Chancery Div. 43 (1876); Stanton v. A. & C. R. R. 2 Woods C. C. 523; Hodge's Appeal, 84 Penn. St. 359 (1877), in which case it was also held that if the holder of the bond was entitled to share in proceeds, other holders would not set up any informality in the manner of its acquisition. In Ketchum v. Duncan, 96 U. S. (6 Otto), 671, it was held that coupons had no superior equity to that of the bonds from which they were taken, or the subsequently maturing coupons. Strong, J., said: "The mortgage in this case secures no priority to the coupons past due, nor to those first due. It places all bondholders or coupon holders on the same level." See also Pennock v. Coe, 23 How. 130.

bonds of a railroad corporation, received by one who has advanced the money with which they are taken up, under an agreement with him that they were to be delivered to him uncanceled, as security for the advances, were valid securities in the hands of the holder; and that the mortgage upon the corporate property given to secure the bonds might be enforced for his benefit; but as between him and the bondholders who received the amount of their coupons in ignorance of the transaction, and supposing their coupons to have been paid, that the latter had the prior equities, and if, upon foreclosure and sale of the mortgaged property, the sum realized were insufficient to pay the face of the bonds, the holder of the coupons would not be entitled to share in the proceeds.[1]

Where a county repudiates a bond given in payment of a precedent debt, the original consideration revives.[2] The bonds of a county are debts as fully as any other of its liabilities, and though issued in pursuance of a law which authorizes a levy of a special tax to pay them, "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the funds so derived should be applied to their payment—in such a case any balance remaining due after applying the proceeds of the special tax to payment of the bonds, should be paid out of the general funds of the county.[3]

SECTION II.

THE FORMAL PARTS OF NEGOTIABLE BONDS AND COUPONS.

§ 1492. The bond, with its coupons annexed, is usually printed upon a sheet of paper resembling in texture and

[1] Union Trust Co. v. Monticello & P. J. R. Co. 63 N. Y. 311, Earl, J., saying: "Equity will keep the securities in life, in such cases, to promote the ends of justice; but not against any person having a superior equity." Harbeck v. Vanderbilt, 20 N. Y. 398; Robinson v. Leavitt, 7 N. H. 100; Miller v. Rutland, &c. R. R. 40 Vt. 399; James v. Johnson, 6 J. Ch. 423; Haven v. Grand Junction R. R. Co. 109 Mass. 88.

[2] Jackson Co. v. Hall, 55 Ill. 444.

[3] United States v. County of Clark, 96 U. S. (6 Otto), 211.

style that used in the issue of currency. And the engraver's art is taxed, as a general thing, to invest the instrument with as much attraction to the eyes of capitalists as possible, and, as well, for the purpose of fortifying it against the ingenious imitations of the forger. The bond is usually large and showy in its lettering and its devices, while the coupons are usually small (as they must needs be on account of their number) and less ostentatious. They are generally arranged so as to be easily severable in the order of their maturity. The signature to the bonds and coupons is generally written by the president of the corporation, or the chief executive of the municipality issuing them; and there is generally a counter signature by the secretary, or treasurer, or chief clerk of the corporation or municipality. The signature to the coupons, where the bonds are properly signed and sealed, need not be written, but may be printed in *fac simile*, or otherwise;[1] and if the bonds be properly executed, it is no valid objection to the coupons that they are signed by only one of the officers who signed the bonds.[2]

§ 1493. *Wording immaterial.*—It is entirely immaterial in what words the coupons are expressed, provided they indicate by whom they are due, and the amount and time of payment. Sometimes they contain words of promise, making them substantially promissory notes in themselves. Thus, in Thomson v. Lee County, 3 Wall. 327, the form was: "Promise to pay to the bearer, at the Continental Bank, in the city of New York, forty dollars interest on bond No. ——." Sometimes they are in the form of a bill of exchange, or draft upon the treasury of the corporation issuing them. Thus, in Moran v. Commissioners of Miami County, 2 Black, 722, the form was: "The treasurer of said county will pay the legal holder hereof one hundred dollars on the first day of September, 1857, on presentation thereof, being for interest due

[1] Pennington v. Baehr (Supreme Court California), Cent. Law Jour. of St. Louis, Vol. 2, No. 6, p. 92, February 5, 1875; Lynde v. County, 16 Wall. 6; McKee v. Vernon Co. 3 Dillon C. C. 210; Dillon on Municipal Bonds, p. 12, note.

[2] Thayer v. Montgomery Co. 3 Dillon C. C. 389.

on the obligation of said county, No. 16, given to the Peru & Indianapolis Railroad Company." Sometimes they are in the form of a mere ticket, or token or "Interest Warrant," as it is called. Thus, in Woods v. Lawrence County, 1 Black, U. S. R. 360, the coupon is in this form: "County of Lawrence—Warrant No. ——, for thirty dollars, being for six months' interest on bond No. ——, payable on the ——— day of ——— at the office of the Pennsylvania Railroad Company, in the city of Philadelphia." Sometimes they are in the form of a check upon a banking house, as in Arents v. Commonwealth, 18 Grat. 753, where the form was: "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond due 1 January, 1867."[1] Sometimes they are in the form of drafts or bills, but name no drawee, as in Mercer County v. Hubbard, 45 Ill. 140, where the form was: "Six per cent. stock, Mercer County, State of Illinois, Railroad Bond No. 20. Pay the bearer sixty dollars on first day of July, 1863, interest to that date. John Cowden, Chairman of Board of Supervisors of Mercer County." However the forms may vary, the intent and legal effect are the same. In all of the cases the coupon is furnished as evidence of a sum due on the bond for interest at a particular time and place, and as authority to the holder to receive it. And whether the coupon be assimilated to a note, bill or check, or be a mere ticket or warrant of amount, and place of payment, the holder may sue on it without producing the bond; but in all cases he receives a sum due and payable according to the terms of the bond.

§ 1494. *Payee.*—The fact that no payee is mentioned in the coupon—an omission which would vitiate an ordinary promissory note—will make no difference, for it is sufficiently evident from the general character of the instrument that it was issued as the binding obligation of the payor to the purchaser of the bond, and was designed to be paid to him or to

[1] See also Mayor, &c. v. Potomac Ins. Co. 58 Tenn. 298.

the bearer.[1] Nor will it matter that it contains no words of promise. For while they may be necessary to constitute an ordinary promissory note, which without them may be a mere memorandum, the very form of the coupon clearly evinces an intention that it shall be an obligation to pay the amount designated, and the intention of the payor is what the law at all times seeks to enforce.[2] We have thus stated what seems to us the true theory as to coupons, but in a New York case, reported since the first edition of this work was in the press, variant views have been expressed.[3]

§ 1495. *The bond not necessarily sealed.*—In common parlance the term bond is generally understood to signify a sealed instrument, in contradistinction to bills and notes of hand which are unsealed, and need only the party's signature to their completion. And as a general rule a bond is a sealed instrument. But it does not follow that it always is or must be. It is certainly usual for the coupon bonds of States and corporations to be authenticated by the State or corporate seal; and it has been said by high authority that it is necessary they should be so authenticated, for the reason that they are executed by States and corporations.[4] But the old idea that States and corporations can only bind themselves under seal is utterly obsolete.[5] Their bills and notes are as binding as their sealed obligations. And it is now pretty well settled by authority, as indeed it is clear in reason, that it is not necessary to constitute a corporate obligation a bond that it should bear its seal. And the term "bond," as now applied to State and corporate obligations, is simply intended to signify a permanent investment security in contradistinction to those of an ordinary and current nature, such as bills of exchange and promissory notes. In New York, where the legislature authorized the

[1] Woods v. Lawrence County, 1 Black, 360; Virginia & Tenn. R. R. Co. v. Clay (Special Court of Appeals of Va. unreported).

[2] Id.

[3] Evertsen v. National Bank, 66 N. Y. (22 Sick.) 19, 20; see *post*, § 1497.

[4] Mercer County v. Hacket, 1 Wall. 83.

[5] Dinsmore v. Duncan, 57 N. Y. 577; Connecticut Mut. Life Ins. Co. v. Cleveland, &c. R. R. Co. 41 Barb. 22; see § 381, vol. 1.

town of Genoa to issue "bonds," and instruments were issued with coupons attached, and formal in all respects except that they bore no seals, it was held that they were valid bonds notwithstanding.[1] The like view has also prevailed in Maine.[2] And in Virginia, where no seals were discoverable in a certain number of the instruments issued by the Virginia and Tennessee Railroad Company styled bonds, and having coupons attached, while on others in the same suit the seals appeared, being distinctly impressed by an instrument on the paper, it was held that those without were as valid as those with seals, there being nothing in the act of assembly which required that seals should be used.[3] In a case before the U. S. Supreme Court, it was said by Swayne, J.: "The principal securities delivered to the company were not bonds, because they were unsealed; but this is immaterial. The twelfth section under which they were issued, expressly declared that those charged with the duty of subscribing may issue bonds bearing interest, or otherwise pledge the faith of the city."[4] But we do not think these remarks necessarily conflict with the views of the text.

§ 1496. *To whom payable.*—Coupon bonds are generally made payable to the party to whom they are issued, or bearer; and in such cases are transferable by delivery.[5] Sometimes they are payable to order and then they pass by indorsement.[6] Sometimes they are payable to the holder, which

[1] The People v. Mead, 24 N. Y. 124 (1861). The act provided that they should be executed under official signatures of supervisors and commissioners. Denio, J., said: "Whatever force there may generally be in the word 'bond or bonds,' which were used in the act, it is overcome by the explicit direction as to their execution which has been mentioned." The case shows in what sense the legislature of New York used the word "bond." So in Conn. Mut. Life Ins. Co. v. Cleveland, &c. R. R. Co. the bonds had no seals. See 41 Barb. 22.

[2] Augusta v. Augusta Bank, 56 Me. 176.

[3] Virginia & Tenn. R. R. Co. v. Clay, Va. Spec. Ct. of App. (1873) unreported.

[4] San Antonio v. Mehaffy, 96 U. S. (6 Otto), 315.

[5] Morris Banking & Canal Co. v. Lewis, 1 Beas. 323; Brookman v. Metcalf, 32 N. Y. 591; Eaton & H. R. R. Co. v. Hunt, 20 Ind. 457; Conn. Insurance Co. v. C. C. & C. R. R. 41 Barb. 9; Carr v. Le Fevre, 27 Penn. St. 413; City of Kenosha v. Lamson, 9 Wall. 478; Mercer County v. Hackett, 1 Wall. 83.

[6] City of Lexington v. Butler, 15 Wall. 295. See § 1499 *b*.

term is regarded as equivalent to bearer. Sometimes they are payable to a certain party, "or his assign;" and in that case the party's assignment is necessary to pass title. But if he make an assignment in blank, the title then passes by delivery.[1] A bond or coupon payable to "A. B. or bearer," is in legal effect payable to bearer, and passes by delivery.[2] In Virginia, where the act of assembly made certain bonds "payable to the holder," it was held a sufficient indication that they were designed to be negotiable and payable to bearer. Joynes, J., said:[3] "The act of March 29th, 1857, in terms makes the coupons 'transferable by delivery,' but does not in terms make the bonds themselves transferable by delivery. This, however, is implied in the provision that 'they shall be payable to the holder,' the obvious intent being that they shall be payable to such persons as may, from time to time, be the holder. These bonds, therefore, as well as the coupons, pass from hand to hand by delivery." But if the bond contained no negotiable words, it would not be deemed negotiable,[4] nor would the coupons without negotiable words if detached from the bonds, be negotiable, as has been held in New York, where it was said of a coupon without such words, by Allen, J.: "In this, as in other contracts, its negotiability depends upon its terms; and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable. * * There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect."[5]

[1] Brainard v. New York, &c. R. R. Co. 25 N. Y. 496; 10 Bosw. 832.

[2] See vol. 1, § 633. It is different in Illinois by statute. See Garvin v. Wiswell, 83 Ill. 218, and vol. 1, § 633, note; § 105, note.

[3] Arents v. Commonwealth, 18 Grat. 750.

[4] City of Atchinson v. Butcher, 3 Kans. 104.

[5] Evertsen v. Nat. Bank, 66 N. Y. (22 Sick.) 20, 22. See Jones on Railroad Securities, § 323.

§ 1497. *Place of payment.*—It is not unusual for the bonds of municipal and other corporations to specify a particular banking house as a place of payment, and still more frequently is it the case that such a place of payment is specified in the coupons. The city of New York, as the great monetary and commercial centre of the country, is often selected for purposes of convenience as the place of payment, and a particular banking house designated.

But the Supreme Court of Illinois has held that, unless specially authorized so to do by the legislature of the State, a municipal corporation cannot bind itself to pay its indebtedness at any other place than its treasury.[1] The Supreme Court of the United States has, however, taken a different view; and where bonds of the city of Muscatine were made payable in New York city, and objection was made that it was unauthorized, Swayne, J., said: "It was according to

[1] Prettyman v. Tazewell County, 19 Ill. 406; Pekin v. Reynolds, 31 Ill. 530; People *ex rel.* &c. v. Tazewell County, 22 Ill. 151, Walker, J., saying: "It is objected that the county had no right to issue bonds or other obligations, payable at any other place than at the county treasury. This court held, in the case of Prettyman v. The Board of Supervisors of Tazewell County, 19 Ill. R. 406, that it was only by virtue of the act of February, 1857, authorizing the county courts of each county which had subscribed to the Tonica and Petersburg road to make the interest of their bonds payable at any place they might choose. That act only applied to subscriptions to that particular road, and can have no application to any other. And it was there held that the county court had no power to issue bonds payable in the city of New York, for want of express authority by legislative enactment. States, counties and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand should be made at their treasury. That is the only place at which payment can be legally insisted upon, and it is the only place where the treasurer can legally have the public funds with which he is intrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister State or in a foreign country, necessarily imposes an obligation on the creditor to provide funds at that place to meet them. And his duties requiring him at the treasury would require the employment of agents, the transmission of the funds at a risk of loss and at a considerable expense in charges, insurance and discounts, which are not incident to its payment at the treasury. And the same reasons apply with equal force to cities, counties and public corporations of a similar character. The legislature has conferred no such general power upon such bodies, and in its absence they have no power to make their indebtedness payable at any other place than at their treasury."

general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds, and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object."[1] This case, which seems to us correct, has been followed in subsequent ones by the same tribunal, in which it has enforced coupons payable beyond State limits. And the like course has been pursued by some of the State Courts in suits on the coupons of railroad companies.[2] In Illinois, where the corporation exceeds its authority by making its securities payable outside of the State, it has been held that, although that particular provision would be invalid, nevertheless, the security would be binding and payable at its treasury, in like manner as if it had been so expressed upon its face. Walker, J., said: "If this coupon had not contained the language 'at the city of New York,' it would have been a legal instrument, strictly conforming to all the requirements of the law authorizing counties to issue evidences of indebtedness. If, then, this unauthorized portion of the coupon were rejected, it would be in conformity to the law, and for the purpose of upholding it the law will reject that portion as surplusage."[3]

§ 1498. *Delivery.*—Delivery is essential to the validity of a coupon bond, as it is to every contract for the payment of money. If an incomplete bond be stolen, without any delivery preceding, it has been held that it would be void in all hands.[4] But if completed, it is conceived that the law

[1] Thomson v. Lee County, 3 Wall. 338 (coupons of Lee County, Iowa, payable at the Continental Bank, New York); Gelpcke v. Dubuque, 1 Wall. 178 (coupons of the city of Dubuque, payable at the Metropolitan Bank, New York); City of Kenosha v. Lamson, 8 Wall. 478; Lynde v. County of Winnebago, 16 Wall, 13; City of Lexington v. Butler, 14 Wall 289 (coupons of Lexington, Ky., payable in New York).

[2] Conn. Mut. Life Ins. Co. v. Cleveland, &c. R. R. Co. 41 Barb. 9. The coupons were issued by the Columbus, Piqua and Indiana R. R. Co. of Ohio, and were payable at the office of the Life and Trust Co. in New York city.

[3] Johnson v. County of Stark, 24 Ill. 91.

[4] Ledwick v. McKim, 53 N. Y. 315; see Redlick v. Doll, 54 N. Y. 236; and Chapter XXVI, §§ 841, 842, vol. 1; 1 Parsons N. & B. 114; § 840, note 1, vol. 1.

would be different.[1] The name of the payee may be left blank for the purpose of having the blank filled by the name of the holder.[2] If the coupons refer to the bonds to which they were attached, and purport to be for interest thereon, the purchaser of them is chargeable with notice of all that the bonds contain.[3]

§ 1499. In the United States Supreme Court, where suit was brought upon coupon bonds of a railroad company payable in blank, no payee being named, and it appeared that they were issued in Massachusetts to a citizen of that State, and passed through several intervening holders to the plaintiff, a citizen of New Hampshire, who inserted his name as payee, and brought suit on the bonds in the Circuit Court of the United States, it was objected that, as the bonds were issued to a citizen of Massachusetts, and as they were not negotiable, or, if negotiable, were not payable to bearer, the plaintiff could not sue in the Federal court. But the United States Supreme Court held, that "it was the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended by the blank to leave the holder his option as to the form or character of negotiability without restriction. * * * Until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and he held them in this character until made payable to himself or order. At that time he was a citizen of New Hampshire, and therefore competent to bring the suit in the court below."[4]

§ 1499 *a*. Frequently the coupon bond is marked by

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[1] Chapter XXVI, § 1, 630, vol. 1.

[2] See Chapter V, § 145, note 3, vol. 1; and Chapter XXVI, §§ 843, 844, vol. 1.

[3] McClure v. Township of Oxford, 94 U. S. (4 Otto), 429; Silliman v. Fredericksburg, &c. R. R. 27 Grat. 119.

[4] White v. Vermont, &c. R. R. Co. 21 How. 575; quoted and approved in Preston v. Hull, 23 Grat. 613.

the party, with figures denoting its number in the particular series to which it belongs. The number is put upon it for the convenience and protection of the maker, but it does not enter into, or in any wise affect the agreement embodied in it. The purchaser of the bond has nothing to do with it, and need give it no heed. Therefore an alteration or erasure of the number is immaterial, and will not affect the rights of the holder of the instrument.[1]

§ 1499 *b. Indorsement of bond.*—It has been held that a railroad company, which has transferred by indorsement a negotiable bond issued by a municipal corporation, is bound as an indorser of negotiable paper, if its liability be fixed by a proper demand and notice. It has been suggested that such a liability is not fairly within the contemplation of the parties to an indorsement of a bond which may have twenty or even forty years to run; but the reply is made that "whatever force this view might have in case of an indorsement of such an instrument by an individual, it has none in case of a corporation which does not die."[2]

SECTION III.

THE NEGOTIABILITY OF COUPON BONDS, AND THE RIGHTS AND DUTIES OF THE HOLDER OR PURCHASER.

§ 1500. *As to the negotiability of coupon bonds.*—There no longer remains a shadow of doubt that the coupon bonds of the United States, of the several States, and of municipal and other corporations, when expressed in negotiable words, are as negotiable to all intents and purposes as bills of exchange or promissory notes. They have been so declared by the courts of highest resort in many of the States,[3] and by a

[1] City of Elizabeth v. Force, 29 N. J. Eq. 591, overruling 28 N. J. Eq. 587; Berdsell v. Russell, 29 N. Y. 220; Commonwealth v. Industrial Emigration Savings Bank, 98 Mass. 12.

[2] Jones on Railroad Securities, § 348; Bonner v. City of New Orleans, 2 Woods, 135.

[3] Arents v. Commonwealth, 18 Grat. 773; Virginia and Tenn. R. R. Co. v.

series of decisions of the Supreme Court of the United States.[1] A solitary decision here or there to the contrary may be found,[2] but as authority it would doubtless weigh as lightly before any State tribunal which has not yet determined the question as a decision of Lord Holt against the negotiability of a promissory note would now weigh in Westminster Hall. If the bond contain no negotiable words, it is not negotiable.[3]

§ 1501. In the United States Supreme Court,[4] a case was heard from Pennsylvania, in which the obligatory part of the bonds ran: "*Know all men by these presents*, that the county of Mercer, in the Commonwealth of Pennsylvania, is indebted to the Pittsburgh & Erie Railroad Company in the full and just sum of $1,000, which sum of money said county agrees and promises to pay twenty years after the date hereof to the said Pittsburgh & Erie Railroad Company, *or bearer*,

Clay (Special Court of Appeals of Va. 1873, not reported); Railway v. Clencay, 13 Ind. 161; Clark v. Janesville, 10 Wisc. 136; Mills v. Jefferson, 20 Wisc. 50; Clapp v. County of Cedar, 5 Clarke, 15; Barrett v. County Court, 44 Mo. 197; see Johnson v. County of Stark, 24 Ill. 75; Craig v. City of Vicksburg, 31 Miss. 216; Chapin v. Vt. & Mass. R. R. 8 Gray, 575; Society for Savings v. City of New London, 29 Conn. 174; National Exchange Bank v. Hartford, &c. R. R. Co. 8 R. I. 379; Virginia v. Ches. & Ohio Canal Co. 32 Md. 501; Conn. Mutual Life Ins. Co. v. Cleveland, &c. R. R. Co. 41 Barb. 9; Spooner v. Holmes, 102 Mass. 503; Morris Canal, &c. Co. v. Fisher, 1 Stock. 667; Langston v. S. C. R. R. Co. 2 So. Car. N. S. 248; Weith v. City of Wilmington, 68 N. C. 341; San Antonio v. Lane, 32 Tex. 405; Bank of Rome v. Village of Rome, 19 N. Y. 24; Seybel v. National Currency Bank, 54 N. Y. 288; Evertsen v. Nat. Bank of Newport, 4 Hun (11 N. Y. S. C. R.), 695; 66 N. Y. 15; Consolidated Association v. Avegno, 28 La. 552; City of Elizabeth v. Force, 29 N. J. Eq. 587; Durant v. Iowa County, 1 Woolworth C. C. 72.

[1] White v. Vermont & Mass. R. R. Co. 21 How. 575; Moran v. Commissioners of Miami County, 2 Black, 722; Mercer County v. Hacket, 1 Wall. 83; Gelpcke v. City of Dubuque, 1 Wall. 175; Meyer v. Muscatine, 1 Wall. 382; Murray v. Lardner, 2 Wall. 110; Thomson v. Lee County, 3 Wall. 227; Supervisors v. Schenck, 5 Wall. 772; Aurora City v. West, 7 Wall. 82; Commissioners of Manor v. Clark, 94 U. S. (4 Otto), 279; and many other cases. See next Chapter.

[2] Diamond v. Lawrence County, 37 Penn. St. 353. "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us."

[3] City of Atchison v. Butcher, 3 Kan. 104.

[4] Mercer County v. Hacket, 1 Wall. 83.

with interest at the rate of six per centum per annum, payable semi-annually, &c.," and was signed under the corporate seal of the county.

The court sustained their negotiability, and said Grier, J.: "This species of bond is a modern invention, intended to pass by manual delivery; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal.[1] But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone; and this malleability to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer."

Thus we see that the usages of trade, overriding the ancient doctrines of the common law, engrafted the quality of negotiability upon these instruments—exhibiting a lively illustration of the progressive spirit of commercial law which is continuously moulding itself to conform to the wants of society and the transactions of business men. Where the bonds are for an uncertain sum—as for instance for so many pounds sterling, if payable in London, or for so many dollars, if payable in New York or New Orleans, and the coupons are of like purport,—neither bonds nor coupons will

[1] This is not a correct statement of the law. The seal may be omitted except where the corporation can only contract by its charter by a sealed instrument. *Ante*, § 1485.

be negotiable, the uncertain element depriving them of their otherwise negotiable character.[1]

§ 1502. *The holder or purchaser of coupon bonds.*—The rights of the purchaser or holder of a coupon bond are determined by the same principles which control those of the purchaser or holder of a bill or note. If a party proposes to purchase a bond from the State or corporation issuing it, he should inquire in the *first* place whether or not the State or corporation has legal power to issue it. For as the bill or note of an infant or lunatic is utterly void, so is any instrument issued by a State or corporation when it has no legal power to do so. In the *second* place, the negotiator should see that the person undertaking to represent the State or corporation is authorized to do so. For if the instrument be in fact a forgery, and never had any legal inception as an obligation, it cannot be enforced, because the forgery was so skillfully performed as to deceive an innocent purchaser.[2] In the *third* place, the competency of principal and agent being established, he should see that all the formalities of a public character required by law are pursued in the execution and issue of the instrument. And then in the *fourth* place, let him see that there is no usury in his purchase.

§ 1503. Where the holder has acquired the bond or the coupons under such circumstances as constitute him a *bona fide* holder for value and without notice, he is entitled to full protection against all equities and frauds which would have affected the title of a previous holder. And it is well settled that gross negligence in the purchaser will not alone vitiate the holder's title.[3] In a leading case decided by the Supreme Court of the United States, it appeared that Lardner owned Camden & Amboy Railroad coupon bonds, payable to bearer, which were deposited in an iron safe in Philadelphia. On the night of 23d of February, 1859, they were

[1] Jackson v. Vicksburg, &c. R. R. Co. 2 Woods C. C. 141.

[2] Maas v. M. K. & T. R. R. 18 N. Y. S. C. (11 Hun), 13.

[3] See Chapter XXIV, Sec. I, p. 627, vol. 1.

stolen, and on the morning of the next day, the 24th, they were negotiated to Murray, a broker, at his office on Wall street, New York. Lardner sued Murray in detinue for the bonds, but was cast in the suit before the Supreme Court of the United States.

Mr. Justice Swayne, who delivered the opinion, disapproved Gill v. Cubitt, 3 Barn. & Cres. 466, and quoted with approval Goodman v. Harvey, 4 Ad. & El. 870, in which Lord Denman said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title;" and considering that the good faith of Murray in the transaction had not been impeached, decided in his favor. He cited also Swift v. Tyson, 16 Pet. 1; Goodman v. Simonds, 20 How. 343; and Bank of Pittsburg v. Neal, 22 How. 96; and declared it to be the settled law of the court in respect to commercial papers—

1. That possession and title are one and inseparable.

2. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

3. The burden of proof lies on the person who assails the right claimed by the party in possession.[1] It should be ob-

[1] Murray v. Lardner, 2 Wall. 110. In his opinion it was said by Mr. Justice Swayne: "What state of facts should be deemed inconsistent with the good faith required, was not settled by the earlier cases. In Lawson v. Weston (4 Esp. 56), Lord Kenyon said: 'If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they

served, and remembered in considering this subject that the cases in which estoppels and waivers are held binding upon

could not recover; but to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000.'

"In the later case of Gill v. Cubitt (3 B. & C. 466), Abbott, C. J., upon the trial, instructed the jury, 'That there were two questions for their consideration: First, whether the plaintiff had given value for the bill, of which there could be no doubt; and, second, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant.' The jury found for the defendant, and a rule *nisi* for a new trial was granted. The question presented was fully argued. The instruction given was unanimously approved by the court. The rule was discharged, and judgment was entered upon the verdict. This case clearly overruled the prior case of Lawson v. Weston, and it controlled a large series of later cases.

"In Cook v. Jadis (5 B. & Ad. 909), the action was brought by the indorsee of a bill against the drawer. It was held that it was 'no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant must show that the plaintiff was guilty of gross negligence.'

"In Backhouse v. Harrison (5 B. & Ad. 1098), the same doctrine was affirmed, and Gill v. Cubitt was earnestly assailed by one of the judges. Patterson, J., said: 'I have no hesitation in saying that the doctrine laid down in Gill v. Cubitt, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bona fide*, but under the circumstances mentioned in Gill v. Cubitt, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bona fide*, but under circumstances that a reasonably cautious man would not have taken them, was no defense.'

"In Goodman v. Harvey (4 Ad. & El. 870), the subject again came under consideration. Lord Denham, speaking for the court, held this language: 'I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title.'

the corporation issuing coupon bonds, are those in which the bonds are in the hands of *bona fide* holders for value without notice of defects, and irregularities in their issue. Such defects and irregularities, if material, are available against a holder

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A final blow was thus given to the doctrine of Gill v. Cubitt. The rule established in this case has ever since obtained in the English courts, and may now be considered as fundamental in the commercial jurisprudence of that country.

"In this country there has been the same contrariety of decisions as in the English courts, but there is a large and constantly increasing preponderance on the side of the rule laid down in Goodman v. Harvey. The question first came before this court in Swift v. Tyson. Goodman v. Harvey, and the class of cases to which it belongs, were followed. The court assumed the proposition, which they maintain to be too clear to require argument or authority to support it. The ruling in that case was followed in Goodman v. Simonds, and again in the Bank of Pittsburg v. Neal. In Goodman v. Simonds, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions: The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicions in the mind of a prudent man, or gross negligence on the part of the taker, at a time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder.

"The rule laid down in the class of cases of which Gill v. Cubitt is the antetype, is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion.

"We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits

who paid nothing, or who had notice of them,[1] unless indeed he sustains himself through the perfected title of an antecedent holder.[2]

§ 1504. *In England* there is a growing disposition to favor the negotiability of instruments similar to the coupon bonds of this country, but they are not yet placed upon so clear and stable a footing.

In 1811, the Court of King's Bench having expressed strong doubt whether a *bona fide* purchaser for value of bonds of the East India Company would be protected against a former owner, from whom they had been obtained by fraud or theft, upon the ground that being choses in action they were not assignable at law; and that the purchaser acquired no legal title.[3] Parliament immediately enacted that such bonds should be assignable and transferable by delivery, and that the money secured by, and the property in them, should be absolutely vested in the assignee at law as well as in equity.[4] Soon after it was held that an exchequer bill, passed by delivery, and that the property vested in a *bona fide* holder.[5] Subsequently, the same doctrine was applied to Prussian bonds, payable to the holder,[6]

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enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In Miller v. Race, Lord Mansfield placed his judgment mainly on the ground that there was no difference in principle between bank notes and money. In Grant v. Vaughn, he held that there was no distinction between bank notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject. The instruction under consideration in the case before us is in conflict with the settled adjudications of this court." See, also, Morris Canal & Banking Co. v. Fisher, 1 Stockt. Ch. 667; Mechanics' Bank v. New York & New Haven R. R. Co. 3 Kern. 599; Moran v. Commissioners, 2 Black, 722; and *ante*, §§ 770 *et seq.* vol. 1; City of Elizabeth v. Force, 29 N. J. Eq. 587.

[1] Chambers County v. Clews, 21 Wall. 321.

[2] See vol. 1, §§ 803 *et seq.* Commissioners v. Balles, 94 U. S. (4 Otto), 109; Commissioners v. Clark, 94 U. S. (4 Otto), 279; McClure v. Township of Oxford, 94 U. S. (4 Otto), 432.

[3] Glyn v. Baker, 1 East, 510.

[4] 51 George III, ch. 64.

[5] Wookey v. Pole, 4 B. & Ald. 1.

[6] Gorgier v. Melville, 3 B. & C. 45.

and, later still, it was left to a jury to determine whether Neapolitan bonds, with coupons, passed in like manner.[1] More recently, in the House of Lords, it has been held (affirming the judgment of the Court of Exchequer Chamber, which accorded with the previous judgment of the Court of Exchequer), that the scrip of a foreign government, issued by it on negotiating a loan (which scrip promised to give to the bearer, after all installments should have been duly paid, a bond for the amount paid, with interest), is, by the custom of all the stock markets of Europe, a negotiable instrument, and passes by mere delivery to a *bona fide* holder for value; that the English law follows this custom, and any person taking it in good faith obtains a title to it, independent of the title of the person from whom he took it.[2]

§ 1505. *Overdue coupons.*—A coupon becomes due, as we have already seen, on the very day fixed for payment of interest on the bond (without grace), whether it be drawn in the form of a bill, note, check, or mere interest warrant.[3] And as soon as that day passes it is regarded as dishonored, like other commercial paper remaining unpaid at maturity; and if thereafter transferred, the transferee takes it subject to all frauds and equities with which it was affected in the hands of his transferrer. In a case in Virginia, it appeared that the coupons of certain bonds of the city of Wheeling, which were guaranteed by the State of Virginia, became due and payable at different times from January 1st, 1862, to January 1st, 1864, inclusive. The plaintiff purchased them *bona fide* from the Farmers' Bank in November, 1864. It did not appear by what title the bank held, and the coupons had been stolen from the second auditor of the State of Virginia, by whom they had been taken up soon after they became

[1] Lang v. Smith, 7 Bing. 284.

[2] Goodwin v. Robarts, 1 Appeal Cases, 476 (1876); 16 Moaks' Eng. Reports, 119 (affirming judgment of the Court of Exchequer Chamber), L. R. 10 Exch. R. 337 (1875); 14 Moaks' R. 591; and of the Court of Exchequer, L. R. 10 Exch. 76 (1875); 12 Moaks' R. 525.

[3] Arents v. Commonwealth, 18 Grat. 773; Bank of Louisiana v. City of New Orleans, 5 Am. Law Reg. N. S. 555; *ante*, § 1490.

payable. They were held by the court as overdue after the 1st of January, 1864, the day of payment, and that accordingly the plaintiff could not recover against the State. "No principle," said Joynes, J., "is better settled than that a party who takes a negotiable instrument by indorsement or delivery, after it has become due, gets no better title than the party had from whom he received it. These coupons were overdue when they came into the hands of the plaintiff, and the transfer to him was subject to the rules applicable to the transfer of overdue paper." [1]

§ 1506. A different view from that above stated was taken in a recent New York case, where it appeared that coupons due April 1st, 1871, were stolen from an express company on April 3d, 1871, and sold to the plaintiff, a banker, on the same day. The court, in its opinion, made no reference to the fact that the coupons were overdue—which, it seems to us, was sufficient to defeat the plaintiff—and held that he was entitled to recover.[2] No authority was quoted in support of the particular point decided, and the decision seems to be at direct variance with the settled doctrine that after maturity negotiable instruments are stripped of that peculiar characteristic, which enables the transferrer to convey a better title than the transferrer himself possesses.[3] [Since the foregoing was written, the opinion of the

[1] Arents v. Commonwealth, 18 Grat. 773 (citing Ashurst v. Bank of Australia, 37 Eng. L. & Eq. 195); First Nat. Bank v. County Commissioners, 14 Minn. 79.

[2] Evertsen v. National Bank of Newport, 11 N. Y. S. C. R. (4 Hun), 694 (1875); The opinion may have been based on the view that the coupons were entitled to grace, and consequently were not to be regarded as overdue when stolen; but no illusion is made to that argument of counsel, and the better opinion is that no grace attaches to coupons. *Ante*, §§ 1490, 1505.

[3] See Chapter XXI, on Transfer by Indorsement, § 724, vol. 1; Chapter XXIV, on Bona Fide Holder, §§ 782, 788; Chapter XLIX, on Checks, Section IX, vol. 2. See also Ashurst v. Bank of Australia, 37 E. L. & Eq. 195; Brown v. Davies, 3 T. R. 80. In Arents v. Commonwealth, 18 Grat. 777, Joynes, J., said: "The point of the objection as to the theft is simply that the coupons had been stolen, not that they had been stolen from the State (the guarantor). The objection to the plaintiff's title on this ground would be the same, no matter from whom they were stolen. * * A person who takes a negotiable instrument after it has

Court of Appeal of New York, in the case cited, has been published, and it will there be seen that the court held the coupons to be entitled to grace, and hence not overdue at the time they were acquired.][1] When a negotiable instrument is overdue, that fact is alone such a suspicious circumstance as makes it incumbent on the purchaser to look to his transferrer's title.[2]

It will always be presumed in favor of a holder of coupons, as of other negotiable instruments, that he acquired them *bona fide* before maturity, and for value, without notice of any defects.[3]

§ 1506 *a*. The simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* holder. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures, renders them, though they may have years to run, and all other coupons dishonored paper, subject to all defenses good against the original holders, would greatly impair the

become due, cannot recover upon it if it has been previously stolen, unless it was stolen before maturity and passed afterward into the hands of a *bona fide* holder, from whom the plaintiff derived his title." 2 Parsons N. & B. 279; Chitty on Bills (13th Am. ed.) [*217], 247.

[1] Evertsen v. National Bank, 66 N. Y. (22 Sick.) 22, 23 (1876), Allen, J. See *ante*, § 1490.

[2] Brown v. Davies, 3 T. R. 80; Rothschild v. Corney, 9 B. & C. 391.

[3] City of Lexington v. Butler, 141 Wall. 295; Chapter XXI, § 728, vol. 1, p. 583; Chapter XXIV, §§ 769, 784, vol. 1.

currency and credit of such securities, and correspondingly diminish their value.[1] But where it is provided in the bonds themselves, that if default be made as to any interest coupon, the bonds shall be due and payable, they so become on default of payment of any coupon.[2]

§ 1507. *The presentment of coupons for payment.*—The degree of diligence to be exercised by the holder of a coupon in presenting it for payment is to be ascertained by reference to the relations of the parties liable upon it. It is due and payable on the very day fixed for payment of interest in the bond. And like a promissory note, payable on a day certain, it need not be demanded, as against the maker, on that day to preserve his liability,[3] and though in the form of a draft on a bank, neither demand nor notice are necessary to charge the drawer.[4] But if there be a guarantor, it must be presented within a reasonable time to charge him.[5] And if there were an indorser, it should be, no doubt, presented at maturity, or else he would be discharged.

§ 1508. It was argued in Virginia, in a case in which the coupons ran "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond, 269, due 1st January, 1867," that they must be regarded as payable on demand on or after the day specified, and not on that day, because the bond provides that the interest shall be paid by Duncan, Sherman & Co. "on presenting" to them the proper coupons. But the Court of Appeals held otherwise, and said Joynes, J.: "Sometimes the form of expression in such bonds is that the coupons shall be 'surrendered,' or 'delivered.' But the meaning is the same, whether the coupon is to be 'presented,' 'surrendered,'

[1] Cromwell v. County of Sac, 6 Otto (96 U. S.), 58, Field, J.; National Bank of N. A. v. Kirby, 108 Mass. 497; Gilbough v. Norfolk, &c. Co. 1 Hughes R. 410.

[2] Mayor, &c. of Griffin v. City Bank, 58 Ga. 584.

[3] Arents v. Commonwealth, 18 Grat. 773; City of Jeffersonville v. Patterson, 26 Ind. 16; Langston v. S. C. R. R. Co. 2 S. Car. N. S. 248.

[4] Mayor, &c. v. Potomac Ins. Co. 58 Tenn. 296.

[5] Arents v. Commonwealth, 18 Grat. 773.

or 'delivered.' The coupon passes by delivery, and is evidence of the title of the holder to demand the interest. This evidence of title must be produced before the money it calls for can be demanded, and it must be surrendered when the money is paid. This is just what the law requires of every holder of a negotiable security, and no more. But can it be said that a bill of exchange or promissory note, payable on a specified day, or so many days after date, is not payable on a day certain, because payment cannot be maintained without a presentment or surrender of the note? I conclude, therefore, that these coupons are negotiable instruments, payable at a day certain, namely, the day mentioned in each as the day the interest called for by the coupon is payable, though the holder was not bound to present them for payment on that day, so as to save the liability of the city (the principal obligor), or of the State (the guarantor)."

SECTION IV.

ACTION ON NEGOTIABLE BONDS AND COUPONS.

§ 1509. There is no doubt that the holder of a corporation or State bond, payable to the holder or to bearer may sue upon it in his own name;[1] and so also may the holder of coupons payable in like manner.[2] But where a suit is brought for the collection of interest upon coupon bonds, the court will not allow the holder of the bond to take judgment for the interest, without producing the coupons, as they might be outstanding and valid in the hands of other parties.[3] From what has been already said it might be inferred, and it is now well established, that suit may be sustained upon a severed coupon, without producing the bond, for the coupon was in-

[1] Carr v. Le Fevre, 27 Penn. St. 413; Society for Savings v. New London, 29 Conn. 175.

[2] Johnson v. County of Stark, 22 Ill. 75.

[3] City of Kenosha v. Lamson, 9 Wall. 482; Redfield on Railways, 605; U. S. Circuit Court, Williamson v. New Albany & Salem R. R. 9 American Railway Times, No. 37.

tended for the very purpose of being disconnected from the bond. In the United States Supreme Court, on the point being raised that suit could not be maintained on the coupons without producing the bond to which they had been attached, Nelson, J., said: "The answer is, that the coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation." [1]

§ 1510. The fact that the bonds from which the coupons sued on have been detached, have been paid and surrendered, does not affect the right of recovery upon them. They thereby lose their character as incidents of the bond, but are still independent and self-sustaining instruments.[2] It has been held that in declaring on coupons the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum, and time of payment.[3]

§ 1511. It has been held in Maine that the holder of a detached coupon running: "The York & Cumberland Railroad Company will pay nine dollars on this coupon in Portland," could not maintain an action upon it as a distinct and independent security, as the language did not imply any negotiable or independent character.[4] But the opinion of Goodenow, J., who dissented, and sustained his views in an elaborate and able argument, has received general commendation, and the whole tendency of recent decisions is to concurrence with him. The fact that the coupon

[1] Comm'rs of Knox Co. v. Aspinwall, 21 How. 54. To same effect, see National Exchange Bank v. Hartford, &c. R. R. Co. 8 R. I. 375; County of Beaver v. Armstrong, 44 Penn. St. 63; Thomson v. Lee Co. 3 Wall. 327; Kennard v. Cass Co. U. S. C. C. Cent. Law Jour. January 15th, 1874; Mayor, &c. v. Potomac Ins. Co. 58 Tenn. 296; Town of Cicero v. Clifford, 53 Ind. 191; Kennard v. Cass. Co. 3 Dillon C. C. 147.

[2] National Exchange Bank v. Hartford, &c. R. R. Co. 8 R. I. 375.

[3] Kennard v. Cass. Co. 3 Dillon. 147.

[4] Jackson v. Y. & C. R. R. Co. 1 Amer. Law Reg. N. S. 585.

contains no word of promise is immaterial, as it clearly evinces an intention to constitute in itself an obligation to pay, and could have been designed for no other purpose.[1]

§ 1512. It has been also held in Connecticut,[2] that suit could not be maintained on a coupon alone, unless it contained a distinct promise to pay the amount represented. The following case was before the court: The railroad company's bonds acknowledged indebtedness in certain amounts to certain trustees, payable to bearer, with semi-annual interest thereon, payable to bearer, at the office of the company, on delivery of certain interest warrants annexed. An interest warrant annexed was as follows: "Interest warrant for $30, being half-yearly interest on bond No. 30 of the N. L. W. & P. R. R. Co., payable on the first day of February, 1856—J. D., Treasurer." An action of debt being brought on the warrant, the Supreme Court of the State held that it could not be made a ground of action, as it was a mere acknowledgment of interest on the bond itself, and did not import a promise; and that the bond should have been declared on, as it alone contained a promise to pay the interest. But Judge Redfield, commenting on this decision in a contribution to "The American Law Register,"[3] observes: "We apprehend no such distinction as this is maintained in practice; but that the coupons are regarded as equally negotiable with the bonds; and that they pass currently as money, the same as the bonds themselves. And the fact that they do not contain the name of any payor, or purport to be made payable to bearer, does not seem to us of any practical importance, if, in fact, among business men they have acquired the character of negotiable securities, and of this we think there can be no question." And this language expresses the true view of the law as we conceive it. The design of the

[1] See Judge Redfield's note in 2 Amer. Law Reg. N. S. p. 585; Virg. & Tenn. R. R Co. v. Clay (Va. Special Court of Appeals, unreported); Mercer County v. Hubbard, 45 Ill. 142; Johnson v. Stark Co. 24 Id. 75; *ante*, § 1483.

[2] Crosby v. New London &c. R. R. Co. 26 Conn. 121.

[3] 2d Vol. New Series, 597.

instrument is unmistakable. What further inquiry can be necessary?[1]

Coupons, being notes or drafts not sealed, are admissible in evidence, and may be recovered upon under the common money counts.[2]

The aggregate amount of coupons sued upon in one of the Federal courts of the United States, determines its jurisdiction of the suit.[3]

§ 1513. *Interest and exchange.*—The coupons being in themselves promissory notes, designed to secure the prompt payment of interest on an investment, it is but just and right that if not paid when due, they should themselves bear interest until paid. As has been said by the Supreme Court of the United States: "Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand like other negotiable instruments, it is quite apparent on general principles that they should draw interest after it is unjustly neglected or refused."[4] And this view is concurred in by numerous authorities.[5] For like reasons, exchange should be recoverable upon coupons under circumstances which would warrant its recovery on any other species of commercial paper. The Supreme Court of the United States has expressed its opinion to the effect that: "Municipal bonds with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them with interest and

[1] Virg. & Tenn. R. R. Co. v. Clay (Va. Special Court of Appeals, unreported).

[2] Mercer County v. Hubbard, 45 Ill. 142; Johnson v. Stark County, 24 Id. 75.

[3] Smith v. Clark County, 54 Mo. 58.

[4] Aurora City v. West, 7 Wall. 105; Town of Genoa v. Woodruff, 92 U. S. (2 Otto), 502.

[5] Arents v. Commonwealth, 18 Grat. 776; Gelpcke v. Dubuque, 1 Wall. 206; Thomson v. Lee County, 3 Wall. 332; Hollingsworth v. City of Detroit, 3 McLean, 472; Mills v. Town of Jefferson, 20 Wis. 50; North Penn. R. R. Co. v. Adams, 54 Penn. 94; San Antonio v. Lane, 32 Tex. 405; Virginia v. Ches. & O. Canal Co. 32 Md. 501; Nat. Exchange Bank v. Hartford P. & F. R. R. 8 R. I. 375; Langston v. S. C. R. R. Co. 2 So. Car. N. S. 248; Beaver County v. Armstrong, 6 Wright, 63; Conn. Mut. Ins. Co. v. Cleveland, &c. R. R. 41 Barb. 9.

exchange at the place where by their terms they were made payable."[1]

§ 1514. But in Illinois it has been held that coupons do not bear interest; and in a case where suit was brought on coupons from bonds of the city of Pekin, it was held that at any rate a demand was necessary. The Court said: "There was no averment of a demand upon the city treasurer for payment of these coupons. If such instruments could in any event draw interest without an express agreement, it could only be after an express demand of payment. Until a demand is made, such a body (a municipal corporation) is not in default. They are not like individuals, bound to seek their creditors to make payment of their indebtedness. It was held in the case of the People ex rel. v. Tazewell County, 22 Ill. 147, that municipal corporations could not even bind themselves to pay their indebtedness at any other place than their treasury, unless specially authorized by legislative enactment."[2] But the Supreme Court of the United States has in several cases given judgment for interest on municipal coupons payable at particular banks named in another State, and without any evidence of a demand of payment at such places;[3] and it has has been distinctly held that no demand is necessary to be alleged or proved as a foundation of claim for interest by the tribunals of some of the States.[4]

[1] Gelpcke v. Dubuque, 1 Wall. 20; City of Jeffersonville v. Patterson, 26 Ind. 16 (1866).

[2] City of Pekin v. Reynolds, 31 Ill. 531 (1863); Chicago v. People, 56 Ill. 327; Johnson v. Stark County, 24 Ill. 75.

[3] Gelpcke v. Dubuque, 1 Wall. 175; Thomson v. Lee County, 3 Wall. 327; see also San Antonio v. Lane, 32 Tex. 405; Mills v. Jefferson, 20 Wis. 50.

[4] North Penn. R. R. Co. v. Adams, 54 Penn. St. 97 (railroad coupons); Langston v. S. C. R. R. Co. 2 So. Car. N. S. 248 (railroad coupons); Va. & Tenn. R. R. Co. v. Clay (Virginia Special Court of Appeals, unreported); *contra*, Whitaker v. Hartford &c. R. R. Co. 8 R. I. 47, Ames, C. J., saying: "Until presented, the defendant (a railroad company), could have been in no default for non-payment; but after it, the coupons being due, the refusal to pay was a clear breach of the contract, and interest from the time of demand and refusal is recoverable by way of damages. Railroad bonds, with interest coupons attached, are purchased for investment and income, and when the latter is not paid at the time promised, no well considered authority properly understood, forbids what

§ 1515. But should the defendant corporation show a continued readiness to pay, at the time and place of payment, the interest would then be abated.[1] This is all that is necessary to protect the defendant, and it is no more than justice to the plaintiff.

§ 1516. *In respect to the statute of limitations*, the negotiable bond and its coupons so far constitute an integral instrument, that the statute applicable to the bond will apply also to the coupons. Thus it has been held by the United States Supreme Court, that coupons of a bond of the city of Kenosha were not barred in less time than twenty years from their maturity, because that was the period applicable to the bond as a sealed instrument. Nelson, J., said: "These coupons, are, substantially, but copies from the body of the bond in respect to the interest. * * There was but one contract, and that evidenced by the bond, which covenanted to pay the bearer five hundred dollars in twenty years, with semi-annual interest, at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but, even without this consideration, looking at their terms, and in connection with the bond, of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties, to hold, when they are cut off from the bond for collection, that the nature and character of the security changes, and becomes a simple contract debt, instead of partaking of the nature of the higher security of the bond, which exists for the same indebtedness. Our conclusion is, that the cause of action is not barred by

principle requires, that the damages from delay of payment should be compensated by interest on the amount due, computed from the day of demand and refusal."

[1] North Penn. R. R. Co. v. Adams, 54 Penn. St. 97.

lapse of time short of twenty years."[1] But while the coupons and the bond constitute an integral contract, and the statute of limitations applying to the latter, applies also to the coupons, nevertheless, it commences to run against the coupons from their respective periods of maturity, although not as against the bond until it also matures.[2]

§ 1517. *Collateral security.*—When negotiable coupon bonds of counties, corporations, or States, are pledged as collateral security for a debt, and there is a failure to pay such debt according to contract, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold after due demand and notice. Such a deposit differs essentially from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which, in the absence of any agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them.[3] The debtor is entitled to notice of the time and place of sale;[4] but if he has knowledge, formal notice is unnecessary.[5]

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[1] City of Kenosha v. Lamson, 9 Wall. 483, 484; followed in City of Lexington v. Butler, 15 Wall. 296.

[2] Clark v. Iowa City, 20 Wall. 586, explaining previous cases.

[3] Alexandria, Loudoun, &c. R. R. Co. v. Burke, 22 Grat. 261; Morris Canal, &c. Co. *v.* Lewis, 1 Beas. (N. J.) 329 (1858); see § 833, Vol. 1.

[4] Ibid.

[5] Alexandria, Loudoun, &c. R. R. Co. v. Burke, 22 Grat. 263, 264.

CHAPTER XLVIII.

THE VALIDITY OF MUNICIPAL BONDS.

§ 1518. Municipal bonds constitute a vast portion of the wealth of the country, and the questions daily arising respecting their validity are of the utmost nicety, and of the highest importance to the communities bound for their payment, as well as to the capitalists and business men trading in them as mercantile commodities. We shall endeavor to discuss their nature and properties thoroughly, dividing the subject under the following heads: I. Nature of municipal corporations, and what powers may be conferred upon them. II. Express and implied powers of municipal corporations. When they may issue negotiable bonds. III. Power of the officer to bind the municipality. Views of the United States Supreme Court. IV. How invalidity of the bond is cured by acquiescence or ratification of the municipality. V. Review of the foregoing doctrines. Views which seem sustained by reason and authority. VI. Legislative control over municipal obligations.

SECTION I.

NATURE OF MUNICIPAL CORPORATIONS, AND WHAT POWERS MAY BE CONFERRED UPON THEM.

§ 1519. A municipal corporation is an involuntary organization of the inhabitants within certain local confines, of all ages, sexes, and conditions, under the will and direction of the legislative branch of the government, by which they are clothed with a corporate character, for the purposes of local government.

A private corporation is a voluntary association of persons capable of contracting, who enter a joint enterprise of private business, and are clothed by the legislature with a corporate character, for the purpose of carrying on such private business.

These definitions exhibit the fundamental, substantial and numerous differences beween the two incorporations.

(1) A municipal corporation is involuntary. The inhabitants within its limits need not accept, nay, may unanimously protest against its charter. But they are clay in the hands of the potter, and the legislature, at its sovereign will, may mould them into a municipal corporation, and then may dissolve or change it at pleasure.[1] It may "erect, divide, and abolish at pleasure."[2] But a private corporation can only be formed by the voluntary act of each member.

(2) A municipal corporation is composed of all the inhabitants within its limits: men, infants, lunatics, and married women. A private corporation can only be formed of those whom the law designates, and who are capable of contracting.

(3) A municipal corporation involves no contract between its members. A private corporation involves a contract by its members *inter esse*, whereby, as against each other, they acquire vested rights and privileges, for the agreed consideration.

(4) A municipal corporation involves no contract between the State and itself, and none between the State and its members. A private corporation must accept its charter. And when accepted, it is a contract between the State and the artificial person constituted by it; and also between the State and the members composing it, subject only to such control as the State may reserve, or be entitled in its sovereign character to exercise over it.

(5) In a municipal corporation the members are not shareholders. They need have no property interest in it;

[1] Soper v. Henry County, 26 Iowa, 264.

[2] 1 Dillon on Municipal Corporations (2d ed.) p. 139, § 30.

and if any, their voice in the corporation is not proportioned to that interest. "The whole interests and franchises are the exclusive domain of the government."[1] In a private corporation the members are (as a general rule) shareholders, and their influence is proportioned to their interests.[2]

(6) A municipal corporation is formed purely for the purposes of local government. As said by the United States Supreme Court, "it is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State."[3] A private corporation is formed for the purpose of private business.

§ 1520. *As to what powers may be conferred upon municipal corporations.*—Remembering that the powers of a corporation are only such as are conferred "either expressly or as incidental to its very existence," and that the latter are such as "are best calculated to effect the object for which it is created,"[4] we come to consider what powers are incidental to the existence of municipal corporations, and what powers are or may be expressly conferred. Quite certain it is, we think, that there is no incidental power in a municipal corporation to borrow money,[5] and none to execute negotiable or other se-

[1] Dartmouth College v. Woodward, 4 Wheat. 636.

[2] East Hartford v. Hartford Co. 10 How. 531. Woodward, J.: "The members (of a municipal corporation) are not shareholders or joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact." There are some private corporations to which this remark does not apply, such as schools and charities, which are *quasi public*, and of course the legislature may provide by charter such rules as it may see fit.

[3] United States v. Baltimore & Ohio R. R. Co. 17 Wall. 322; 1 Dillon on Mun. Corp. (2d ed.) 139, note; Jones on Railroad Securities, § 222. In Hodges v. City of Buffalo, 2 Den. 110, it was held that the common council had no authority to furnish an entertainment at public expense, and the party providing it could not recover against the city.

[4] Dartmouth College v. Woodward, 4 Wheat. 636.

[5] Miller v. Ray, 19 Wall. 468; Thomson v. Lee County, 3 Wall. 327; Starin v. Town of Genoa, 23 N. Y. 447–449; Hitchcock v. City of Galveston, U. S. Dist. Ct. Cent. L. J. May 21, 1875, p. 331; Jones on Railroad Securities, § 222. But it has been held that municipal corporations have all the powers of natural persons respecting their debts. Kelley v. Mayor, 4 Hill, 263.

curities for debt,[1] though there is upon these, as upon almost every question as to the powers of such bodies, a perplexing conflict of authority.[2] "A municipal corporation," says the United States Supreme Court, "cannot issue bonds in aid of extraneous objects (a railroad in the present case), without legislative authority, of which all persons dealing with the bonds must take notice."[3] But equally certain it is, that the legislature may expressly or impliedly authorize a municipal corporation to borrow money, and to issue its securities therefor, negotiable or non-negotiable, provided it be done for a public purpose.[4] And that it cannot authorize it to pledge its credit, or appropriate its means to a private purpose; for such a purpose is contrary to the very nature of the institution, and any diversion of the people's property to it, without their unanimous consent, would be taking one private citizen's substance for the benefit of another, and would operate a virtual confiscation.[5]

§ 1521. But, provided the purpose be a public one, the legislature may empower the corporation not only to subscribe to it for a consideration, but also to devote to it its means or its credit.[6] Thus it has been recently decided by the United States Supreme Court, that where the legislature of Nebraska authorized the county of Otoe to aid the Burlington and Missouri River R. R. Co. by issuing its bonds to it as a donation, such bonds were valid,[7] and that decision has been followed and reaffirmed in other cases.[8]

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[1] Thomson v. Lee County, 3 Wall. 327; Starin v. Town of Genoa, 23 N. Y. 447–449; Dively v. Cedar Falls, 21 Iowa, 566; Clark v. Des Moines, 19 Id. 200.

[2] Kelley v. Mayor, 4 Hill, 263.

[3] Town of South Ottowa v. Perkins, 94 U. S. (4 Otto), 262. See also Pendleton Co. v. Amy, 13 Wall. 297; Kennicott v. Supervisors, 16 Wall. 452; St. Joseph Township v. Rogers, 16 Wall. 644; Town of Coloma v. Eaves, 92 U. S. (2 Otto), 484.

[4] See *infra*, § 1522, and *post*, Section VI.

[5] National Bank v. City of Iola, 9 Kans. 700; Loan Ass'n v. Topeka, 20 Wall. 655.

[6] Davidson v. Ramsey County, 18 Minn. 482 (1872); see 1 Dillon on Mun. Corps. (2d ed.) 220, § 104, and notes.

[7] Railroad Company v. County of Otoe, 16 Wall. 667 (1872).

[8] Olcott v. Supervisors, 16 Wall. 678 (1872); Town of Queensbury v. Culver,

§ 1522. *As to what purposes are public.*—The construction and grading of streets;[1] the construction of water works;[2] of a bridge;[3] of a town hall;[4] gas works;[5] markets;[6] the providing of fire engines;[7] the laying out of cemeteries,[8] are proper objects of municipal care, and undoubtedly the legislature may authorize the municipality to contract with reference to them, to borrow money for the purpose of effecting those objects, and to issue its negotiable securities therefor.[9] But the loaning of money to enable citizens to rebuild their burned houses,[10] to equip and furnish manufacturing establishment of individuals,[11] to construct saw or grist mills[12] (unless such mills be made public institutions, in which case it would be different),[13] to improve a water privilege and manufacture lumber,[14] to establish a citizen in business,[15] to provide destitute citizens with provisions and grain for seed and feed,[16] would not be within the scope of public purposes, and the legislature could confer no authority to subscribe to such objects.

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19 Wall. 91 (1873); Township of Pine Grove v. Talcott, 19 Wall. 667; Clemens on Corporate Securities, p. 39.

[1] Sturtevant v. City of Alton, 3 McLean, 393; Rogers v. Burlington, 3 Wall. 362.

[2] Rome v. Cabat, 28 Ga. 50; Hale v. Houghton, 8 Mich. 458; Stein v. Mobile, 24 Ala. 591.

[3] County Commissioners v. Chandler, 96 U. S. (6 Otto), 205, Bradley, J.: "Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right. * * * In our judgment, the bridge in question is a public bridge, and a work of internal improvement within the meaning of the statute." Bonds issued in aid of the bridge were held valid. See also Township of Burlington v. Beasley, 94 U. S. (4 Otto), 314.

[4] Greeley v. People, 60 Ill. 19.

[5] City of Aurora v. West, 9 Ind. 74.

[6] State v. Madison, 7 Wisc. 688.

[7] Mills v. Gleason, 11 Wisc. 470; Robinson v. St. Louis, 28 Mo. 488.

[8] Ibid.

[9] 1 Dillon on Mun. Corps. § 66.

[10] Lowell v. Boston, 111 Mass. 454 (1873).

[11] Loan Association v. Topeka, 20 Wall. 655; Commercial N. Bank v. Iola, 2 Dill. C. C. R. 353; 9 Kans. 700.

[12] Allen v. Inhabitants of Jay, 60 Me. 124 (1871); 12 Am. Law Reg. N. S. 481.

[13] Township of Burlington v. Beasley, 94 U. S. (4 Otto), 314.

[14] Weismer v. Village of Douglass, 11 N. Y. S. C. (4 Hun), 211.

[15] Corley's Const'al Lim. 494.

[16] The State *ex rel.* Griffith v. Osawkee Township, 14 Kans. 418.

§ 1523. *Railroads.*—Whether or not the construction of a railroad, or other highway, is a public purpose to which a municipal corporation may be authorized to contribute is a much debated question. The United States Supreme Court has affirmed that it is in numerous decisions,[1] and so likewise have many of the State courts of last resort.[2] And it has been held that a municipal corporation might, under legislative authority, donate its bonds to a railroad company,[3] and even though it was outside of the State, but looking to a connection with it.[4] And also that it might subscribe under competent authority to a "Railroad and Banking Company";[5] or to a railroad company whose charter vested it with power to carry on the business of a coal, mining, furnace, or manufacturing Company.[6] But these decisions are combated with great power of reasoning in a few of the States,[7] and the disastrous frauds that have resulted from

[1] Knox County v. Aspinwall, 21 How. 539; Gelpcke v. City of Dubuque, 1 Wall. 175 (1863); Seybert v. City of Pittsburg, Id. 272; Meyer v. City of Muscatine, 390; Sheboygan Co. v. Parker, 3 Wall. 96; Havemeyer v. Iowa County, 3 Id. 294; Thomson v. Lee County, 3 Id. 330; Rogers v. Burlington, 3 Id. 362; Mitchell v. Burlington, 4 Wall. 274; Campbell v. Kenosha, 5 Id. 196, 200; Supervisors v. Schenck, 5 Id. 776; The City v. Lamson, 9 Id. 479; Bath Co. v. Amy, 13 Id. 244; Pendleton Co. v. Amy, 13 Id. 298; Kennicott v. Supervisors, 16 Id. 452; St. Joseph Township v. Rogers, 16 Id. 644; Olcott v. Supervisors, 16 Id. 678; Township of Pine Grove v. Talcott, 19 Wall. 666.

[2] Goddin v. Crump, 8 Leigh, 120 (1837) (navigation company); City of Bridgeport v. Housatonic R. R. Co. 15 Conn. 475 (1843); Nichol v. Mayor of Nashville, 9 Humph. 252 (1848); Talbot v. Dent, 9 B. Mon. 526 (1849); Slack v. Maysville R. R. Co. 13 Id. 1 (1852); Commonwealth v. McWilliams, 11 Penn. St. 61 (1849); Sharples v. Mayor, 21 Id. 147; Moers v. City of Reading, 21 Id. 188; Davis v. Ramsey Co. 18 Minn. 482; Hallenbeck v. Hahn, 2 Neb. 377; Strickland v. Railroad Co. 27 Miss. 209; City v. Alexander, 23 Mo. 483; Leavenworth Co. v. Miller, 7 Kan. 479; Aurora v. West, 9 Ind. 74; Gibbons v. R. R. Co. 36 Ala. 410; Prettyman v. Supervisors, 19 Ill. 406; Butler v. Dunham, 27 Ill. 474; Augusta Bank v. Augusta, 49 Me. 507; Stein v. Mobile, 24 Ala. 591; Starin v. Genoa, 23 N. Y. 439; Gould v. Sterling, Id. 439; Benson v. Mayor, 24 Barb. 248; Duanesburg v. Jenkins, 40 Barb. 579; San Antonia v. Lane, 32 Tex. 405.

[3] Town of Queensbury v. Culver, 19 Wall. 84.

[4] Railroad Co. v. County of Otoe, 16 Wall. 667. See also Quincy &c. R. R. Co. v. Morris, 84 Ill. 410.

[5] Winn v. City of Macon, 21 Ga. 275.

[6] County of Randolph v. Post, 93 U. S. (3 Otto), 502.

[7] People v. Township Board of Salem, 20 Mich. 452, against the power; so

judicial recognition of their doctrines, reinforcing logic with great considerations of public policy, would doubtless now overthrow them, were they not so solidly imbedded in our jurisprudence, with vested rights of property resting upon them. Constitutional inhibitions are now coming to the relief of the people;[1] and it is probable that in a few years, the constitutions of the States, will without exception, stand between the people and the repetition of such abuses as have disgraced the municipal history of this country, and overburdened its citizens with taxation.

§ 1524. *Constitutional Restrictions.*—In those cases where it appeared there were constitutional restrictions upon the legislatures of States, forbidding the contracting of debts, or subscriptions to internal improvements by them, it has been held that such restrictions did not apply to the municipal divisions of a State.[2] And conversely, that restrictions upon the powers of municipal corporations do not apply to the State.[3] But if a constitution forbid the General Assembly to "authorize any county, city, or town, to become a stockholder in, or loan its credit to, any company, association, or corporation," unless two-thirds of the qualified voters assent, townships will be comprehended in the interdict, as they are mere tracts of territory, having no more existence as corporations than the wards of a city.[4]

Where such provisions are incorporated into the constitutions of the States, if they appear on their face, by fair and

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also Thomas v. Port Huron, 27 Mich. 320. In Iowa the decisions have vacillated. At first the power was affirmed, Dubuque Co. v. R. R. Co. 4 G. Greene, 1; then denied, State v. Wapello Co. 13 Iowa, 388; Hanson v. Vernon, 27 Iowa, 28.

[1] In Ohio, Illinois, and Pennsylvania such prescriptions are prohibited by the constitution.

[2] Township of Pine Grove v. Talcott, 19 Wall. 674; Gelpcke v. City of Dubuque, 1 Wall. 204; Clark v. Janesville, 10 Wis. 136; Clapp v. Cedar Co. 5 Iowa, 15; Thompson v. City of Peru, 29 Ind. 305; Cass v. Dillon, 2 Ohio St. 607; Slack v. Railroad Co. 13 B. Mon. 16; Prettyman v. Supervisors, 19 Ill. 406; Pattison v. Supervisors, 13 Cal. 175; Johnson v. Stark Co. 24 Ill. 75; Butler v. Dunham, 27 Ill. 474; Robertson v. City of Rockford, 21 Ill. 452.

[3] Cooley Const. Lim. 218, 219; 1 Dillon on Mun. Corp. § 90, p. 208.

[4] Harshman v. Bates County, 2 Otto (92 U. S.) 569.

reasonable intendment, to apply only to future acts conferring authority by the legislature, they will not abrogate and annul existing acts by which authority is conferred upon municipal bodies to make particular subscriptions, although those bodies have not carried them out. And bonds issued in pursuance of such pre-existing acts will be valid.[1] In Minnesota, where the constitution forbade the legislature to authorize the issue of municipal bonds in excess of ten per cent. of taxable property, it was construed to be applicable to future legislation, and not to laws in existence.[2] The United States Supreme Court, speaking of a prohibitory clause of the constitution of Missouri, says: "This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."[3]

§ 1525. *Federal Decisions.*—It is a general principle of the jurisprudence of the United States that the construction given to a statute of a State by the highest court thereof, is a part of the statute itself, and is as binding upon the Federal courts of the United States as the text of the statute.[4] And if the highest court of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, the Federal courts will follow the latest settled adjudications.[5] But still they will not follow every oscillation of opinion. And, therefore, where it appeared that at the time when the city of Dubuque issued certain coupon

[1] Smead v. Trustees of Union Township, 8 Ohio St. 394; Cass v. Dillon, 2 Ohio St. 398; Commissioners of Knox County v. Nichols, 14 Ohio St. 260; Woodward v. Supervisors of Calhoun County, U. S. District Court of Mississippi, Cent. L. J. June 18, 1875, p. 396. See also County of Henry v. Nicolay, 95 U. S. (5 Otto), 619; The State v. Sullivan Co. 51 Mo. 522; The State v. Greene Co. 54 Mo. 540; County of Callaway v. Foster, 93 U. S. (3 Otto), 567.

[2] State v. Town of Clark, 23 Minn. 423.

[3] County of Scotland v. Thomas, 94 U. S. (4 Otto), 688.

[4] U. S. v. Morrison, 4 Pet. 124; Green v. Neal, 6 Pet. 291; Township of Elmwood v. Many, 2 Otto (92 U. S.) 287.

[5] Leffingwell v. Warren, 2 Black, 599.

bonds, their legality had been determined by a series of decisions of the highest court of Iowa, the Supreme Court of the United States refused to follow subsequent decisions of the same tribunal holding such bonds invalid, Swayne, J., saying: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." And approved as the sound and true rule that "if the contract, when made, was valid by the laws of the State as then expounded by all the departments of the government, and administered in its courts of justice, its validity and obligations cannot be impaired by any subsequent action of legislature or decision of its courts altering the construction of the law.[1]

§ 1526. More recently the United States Supreme Court has taken a step farther, and held that questions relating to bonds issued in a negotiable form involve questions relating to commercial securities; and that whether under the constitution of the State such securities are valid or void belongs to the domain of general jurisprudence. And, accordingly, that the decisions of the highest court of the State relating to such bonds will not be respected by that tribunal, when not satisfactory to its judges, and the question arises upon a bond in the hands of a *bona fide* holder who is the citizen of another State or a foreigner.[2]

SECTION II.

EXPRESS AND IMPLIED POWERS OF MUNICIPAL CORPORATIONS.—WHEN THEY MAY ISSUE NEGOTIABLE BONDS.

§ 1527. The powers of corporations have been divided judiciously into three classes: (1) Those granted in express

[1] Gelpcke v. Dubuque, 1 Wall. 202. [See Ohio Life & Trust Co. v. Debolt, 16 How. 432.] To same effect, see also Havemeyer v. Iowa Co. 3 Wall. 294; Larned v. Burlington, 5 Wall. 275; Mitchell v. Burlington, 5 Wall. 274; Thomson v. Lee County, 3 Wall. 327; Lee v. Rogers, 7 Wall. 181; City of Kenosha v. Lamson, 9 Wall. 486; Campbell v. Kenosha, 5 Wall. 194; Clemens on Corporate Securities, 32, 33; Township of Elmwood v. Many, 92 U. S. (2 Otto), 298.

[2] Township of Pine Grove v. Talcott, 19 Wall. 667.

words. (2) Those necessarily implied or necessarily incident to the powers expressly granted. (3) Those absolutely essential to the declared purposes and objects of the corporation not simply convenient, but indispensable.[1] Whatever power is implied is as effectual as what is expressed,[2] and in the United States the following propositions are sustained by weight of authority:

1. That whenever a municipal corporation has power conferred to contract a debt, borrow money, or issue a negotiable security, it is to be regarded *quoad hoc* as a private corporation.[3]

2. That a municipal corporation has implied power to contract a debt whenever necessary to carry out any power conferred upon it.[4]

3. That whenever it may contract a debt, it may borrow money to pay it.[5]

4. That whenever it may contract a debt or borrow money, it may issue its negotiable coupon bonds for its payment.[6]

§ 1528. The *first* proposition cannot be sustained, in our judgment. The differences between the public and the private corporation, indicated in the beginning of this chapter, show that their natures have little, if anything, in common. A municipal corporation, indeed, cannot be empowered to act for private purposes. Its character as a government cannot be divested. And in no sense can it be looked upon as anything else than as a local arm of the sovereign power.[7]

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[1] 1 Dillon on Municipal Corporations (2d ed.) 173, § 55; Merriam v. Moody's Exr's, 25 Iowa, 163; Tucker v. City of Virginia, 4 Nev. 20.

[2] United States v. Babbitt, 1 Black. 61; Gelpcke v. Dubuque, 1 Wall. 221; Lynde v. County of Winnebago, 16 Wall. 13.

[3] De Voss v. City of Richmond, 18 Grat. 338, 345, quoting Moodalay v. East India Co. 1 Brown C. C. 469; Touchard v. Touchard, 5 Cal. 307; City of Galena v. Corwith, 48 Ill. 424.

[4] Lynde v. County, 16 Wall. 12.

[5] Lynde v. County, 16 Wall. 12; City of Galena v. Corwith, 48 Ill. 424.

[6] De Voss v. City of Richmond, 18 Grat. 338; Railroad Co. v. Evansville, 15 Ind. 395; Commonwealth v. Pittsburg, 34 Penn. St. 496; Middleton v. Alleghany Co. 37 Penn. St. 241; Reinbath v. Pittsburgh, 41 Id. 278; Galena v. Corwith, 48 Ill. 423.

[7] Roosevelt v. Draper, 23 N. Y. 318, 325; Darlington v. Mayor, 31 N. Y. 164.

§ 1529. The *second* proposition is undoubtedly correct, but the authorities differ as to the facts which justify its application. If a municipal corporation be empowered to erect public buildings, court houses, markets, &c., it must necessarily contract debts for the material furnished, and services rendered. And it has been held that it may execute its negotiable bonds for the amounts agreed to be paid to the contractors.[1]

§ 1530. The *third* proposition, that, whenever the municipality may contract a debt, it may borrow money to pay it, has been illustrated in numerous cases. Thus it has been held that, where the town of Chilicothe was empowered to purchase real estate, and erect public buildings, its power to borrow money for these purposes was implied, and its bonds for money borrowed valid.[2] The like decision has been rendered where money was borrowed to carry out authority to a municipal corporation to build markets; the court saying that "corporations may resort to the usual and convenient means of carrying out powers granted," and that "no means is more usual for the execution of such objects than that of borrowing money."[3] So where a county was authorized to construct a court house, and levy a tax for that purpose, it was held that the county judge (the officer designated) had authority to borrow money, and issue negotiable county bonds therefor; and to sell the bonds outside of the State to raise money for the purpose indicated.[4]

Judge Dillon says in his Treatise on Municipal Corporations (2d ed. p. 152, note), that "the private character ascribed to it (a municipality) is difficult exactly to comprehend," and pertinently inquires, "Are not all powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the State at large?" He evidently discountenances the idea of a municipality being regarded as private in any regard.

[1] Lynde v. County, 16 Wall. 12; Mills v. Gleason, 11 Wisc. 470; Bank v. Chilicothe, 7 Ohio, Part II, 31.

[2] Bank v. Chilicothe, 7 Ohio, Part II, 31 (1836).

[3] Mills v. Gleason, 11 Wisc. 470; State v. Madison, 7 Wisc. 688.

[4] Lynde v. County of Winnebago, 16 Wall. 12 (1872), Chief Justice Chase, and Field and Miller, JJ., dissenting.

But there is a fundamental difference between contracting a debt to one person, and borrowing money from another to pay it. It may be convenient to do so, but it cannot be necessary. And the power to contract a debt to A. cannot, by any reasonable intendment, be construed into a power to borrow money from B. In the one case the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes. And the logic of the cases which impress this view seems to us unanswerable.[1] Recognizing the fact that corporation officers are special agents, and that municipal corporations are themselves but special agents of government, it is difficult to see how the power of the corporation or of its officers (who are agents of agents) can be so broadly extended by implication, as some of the cases maintain. If the corporation be authorized to contract with A. to build a court house, its bonds given for the amount due him would be good. But enlarging the power to authorize the borrowing of money, and, under color of building one court house, municipal officers might flood the markets with millions of negotiable bonds for money borrowed from different persons, which they might put in their pockets, and leave the building still unpaid for. In other words, a county officer authorized, as in the case cited below,[2] to provide a single county edifice, may dissolve the whole property of the county in the twinkling of an eye, and by the magic of a negotiable bond, into his pocket. Courts which tolerate such doctrines, and support them by the narrow technicalities of estoppel, seem to us not exempt from that "epidemic insanity" which has induced extravagant corporate subscriptions to public works, and which has been so much deprecated.[3] In Louisiana the charter of a municipal corporation granted authority to it to give such bonds as might be necessary, to conduct its litigation, or on

[1] Ketchum v. City of Buffalo, 14 N. Y. 256.

[2] Lynde v. County of Winnebago, 16 Wall. 12.

[3] See Mercer County v. Hacket, 1 Wall. 96, and *post*, § 1541.

the current administration of its affairs. It was held that this did not authorize the issue of bonds for raising money; and that bonds issued for such a purpose were void, even in the hands of a *bona fide* holder.[1]

§ 1531. As to the *fourth* proposition, when the power to borrow the money is clear, it necessarily involves in its exercise the execution of a security for its repayment; and negotiable coupon bonds, being the common and most acceptable form of municipal securities, when given for money legitimately borrowed, would undoubtedly be valid, as has been stated.[2] And it is generally considered that when the municipality has authority to contract a debt it has the power to evidence the same by a bill, note, bond, or other instrument.[3]

§ 1532. The United States Supreme Court has held that authority to a city to subscribe to stock in a railway company "as fully as an individual," imported power to subscribe to the stock on credit, and issue its negotiable bonds in payment.[4] So that authority to a city "to borrow money for any object in its discretion," authorized it to subscribe to a railroad corporation, and to borrow money upon its negotiable bonds to pay for it.[5] It has carried its doctrines on this subject to great lengths, and has held that authority to "borrow money for any public purpose," authorized the city of Burlington to subscribe to railroad stock, and to issue its negotiable bonds to the company to be sold by it, the proceeds realized by the company to be appropriated to pay for

[1] Wilson v. City of Shreveport, 29 La. 678 (1877), Marr, J.: "The creditor of a corporation is bound to see that the contract or obligation of which he claims the benefit, is within the power which the corporation may lawfully exercise. The fact that the obligation is in the shape of a negotiable instrument, or that it was acquired in good faith, for a valuable consideration before maturity, in no manner enlarges the power of the corporation, or gives any additional force or validity to its unauthorized acts."

[2] See *ante*, § 1527.

[3] City of Williamsport v. Commonwealth, 84 Penn. St. 500.

[4] Seybert v. City of Pittsburg, 1 Wall. 372; Commonwealth *ex rel.* Reinbath v. Pittsburg, 41 Penn. St. 278.

[5] Meyer v. Muscatine, 1 Wall. 387.

the stock.[1] But borrowing money to pay for stock is one thing, and hypothecating credit in the shape of bonds to be sold to pay for it is another and very different thing; and this decision stretches implication to the last attenuation. More in conformity with principle we think is the decision to the contrary in New York, where it was held that authority to a town to borrow money at seven per cent. and to pay it out for railroad stock at par, did not warrant it to exchange the town bonds for an equal nominal amount of stock, leaving it in the power of the railroad company to sell the bonds at a discount.[2]

§ 1533. *As to the sale of municipal bonds.*—When they have been once issued into the market as valid subsisting securities, they may be sold for any amount by the holder, like any other chattels.[3] But in the hands of the municipality they are not, unless so made by statute, the subject of sale. Legislative authority to issue bonds for the stock of a railroad corporation, or other public improvement, does not imply authority to sell them and apply the proceeds to

[1] Rogers v. Burlington, 3 Wall. 654. Field, J. (with whom concurred Chase, C. J., and Miller and Grier, JJ.), dissented, in an opinion of rare ability. "Here," he said, "the authority is to borrow money, yet no money was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms."

[2] Starin v. Town of Genoa, 23 N. Y. 454, Lott, J., saying: "It was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or the position that the credit merely of any town should be given, through and by which money might be raised. A town might be willing to incur a debt to a limited sum, with the knowledge that the whole amount for which it was incurred was actually to be appropriated to the construction of a railroad that might be deemed conducive to its interests, but would absolutely refuse to issue their bonds, for the purpose of sale, from which much less than the amount for which they were given might be realized. If it had been intended to authorize bonds to be given for stock, there is no reason why that intention should not have been declared, as was done in the law in relation to the village of Rome above referred to." See also Gould v. Town of Sterling, 23 N. Y. 458, and opinion of Selden, J., quoted by Field, J., dissenting, in above quoted case. Judge Cooley in his admirable work on Constitutional Limitations, p. 218, note, approves the New York view.

[3] Town of Danville v. Sutherlin, 20 Gratt. 555; City of Lynchburg v. Norvell, 20 Gratt. 601; see § 750, vol. 1.

pay for the stock, especially if the sale be below par.[1] And authority to issue bonds for a loan of money, does not imply authority to sell the bonds below par; and such a sale would be usurious if the discount were greater than allowed by law, and render the bonds absolutely void.[2] Any one who purchases bonds, knowing that they were negotiated in a manner not authorized by law, is not a *bona fide* holder, but takes them subject to any defense existing against them;[3] and if they were usurious in their inception, even a *bona fide* holder for value and without notice, it seems, cannot recover against the corporation.[4] But a third party selling them to him, warrants their validity, and he may recover from him the consideration paid.[5]

§ 1534. The fact that the bonds acquired from a city are issued in the form of a sale, and are paid for in a depreciated medium, nominally greatly in excess of their face value, it has been held, does not relieve the transaction from the taint of usury, if in reality the real value of such depreciated medium bore to the face value of the bond a proportion which would amount to usury;[6] and it has been also held that the taint would not be removed by the fact that the bonds might be paid at maturity in the currency receivable for taxes by

[1] City of Atchison v. Butcher, 3 Kans. 104: Daviess County Court v. Howard, 13 Bush (Ky.), 102, 111.

[2] Town of Danville v. Sutherlin, 20 Gratt. 555; City of Lynchburg v. Norvell, 20 Gratt. 601. In the first named of the above cases, p. 580, Staples, J., said: "In every sale there must be, not only parties, but a thing to be sold. A man cannot sell his own promises to pay, because such an obligation is not the subject of sale. So long as it remains in his own possession it is payable to no one, and binds no one." See Com'rs of Craven Co. v. A. & N. C. R. R. 77 N. C. 295.

[3] Starin v. Town of Genoa, 23 N. Y. 440; City of Atchinson v. Butcher, 3 Kans. 104.

[4] See City of Lynchburg v. Norvell, 20 Grat. 601.

[5] See Chapter XXII, on Transfer by Assignment, §§ 732 *et seq.* vol. 1; Young v. Cole, 3 Bing. N. C. 724.

[6] Town of Danville v. Sutherlin, 20 Grat. 555. Staples, J., with whom Christian, J., concurred. Moncure, P., dissented. Anderson and Joynes, JJ., not sitting. See also City of Lynchburg v. Norvell, 20 Grat. 601.

the State wherein they were issued.[1] But there is to our mind great force in the view that if the currency of payment be not gold, but such as may be in circulation at time of payment, there is no usury in the transaction, as there is no certainty that the payee will receive back his principal amount.[2]

§ 1535. *Submission to popular vote.*—In submitting to popular vote the question of subscription to a public improvement, the corporate authorities must proceed in conformity with the statute authorizing such vote to be taken, and not in such a manner as to confuse or confound the question presented with another.[3] If the statute requires the subscription vote to "specify the amount," it will not suffice to submit the question to the people calling on them to vote for or against an amount "not exceeding" a sum named.[4] And if it require the grand jury to specify the amount, it will not suffice for them to simply limit the amount.[5] But all such irregularities may be cured by legislative ratification.[6] And mere informalities—as for instance making the bonds payable "to the railroad company or bearer," where the statute provided they should be payable "to the president and directors of the railroad company, and their successors and assigns," would be immaterial.[7]

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[1] City of Lynchburg v. Norvell, 20 Grat. 601. Staples, J., with whom Christian, J., concurred. Moncure, P., dissented.

[2] See Bracken v. Griffin, 3 Call, 433; and Boulware v. Newton, 18 Grat. 708, where this view is illustrated.

[3] Peoria & O. R. R. Co. v. County of Tazewell, 22 Ill. 156. Walker, J., "In the case of Fulton County v. The Wabash and Mississippi Railroad Co., 21 Ill. 338, this court held, that the law did not authorize the submission of a proposition for subscription of a gross sum to two roads, in the same submission, in such a manner that the voter had no option to vote for the one and against the other. This submission was made in that manner. It is proposed to subscribe one hundred thousand dollars, one-fourth to this and three-fourths to another road, and the voter, however much in favor of subscription to one, and opposed to the other, was compelled to vote either for or against the entire subscription."

[4] State v. Saline County, 45 Mo. 242.

[5] Mercer County v. Pittsburgh, &c. R. R. 27 Penn. St. 389.

[6] McMillen v. County Judge, 6 Iowa, 393.

[7] Woodward v. Supervisors of Calhoun County, U. S. Dis. Ct. Cent. L. J. June 18, 1875, p. 396.

If bonds be issued by corporate authorities before the law authorizing their issue is published and takes effect, they will be void,[1] though subject to subsequent ratification.

§ 1535 *a*. Sometimes the constitution of a State, or the act of the legislature, requires as a condition precedent to subscriptions, and the consequent issue of bonds by counties, cities, or towns, that "a majority (or two-thirds or some other proportion) of the legal (or qualified) voters" shall have given their assent thereto at an election. "It is insisted," said Clifford, J., in a case before the U. S. Supreme Court, "that the legislature, in adopting the phrase 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at an election, notified and held to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected; and the court is of opinion that such is the true meaning of the enactment, as the question would necessarily be ascertained by a count of the ballot."[2] "All qualified voters," says Chief Justice Waite in another case, "who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed."[3] These views have not prevailed without dissent in the U. S. Supreme Court;[4] and the opposing views have much to commend them to favor.[5] In our judgment

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[1] Phelps v. Alfred Bank, 13 Wisc. 432; Berliner v. Town of Waterloo, 14 Wisc. 378.

[2] St. Joseph Township v. Rogers, 16 Wall. 644.

[3] County of Cass v. Johnston, 95 U. S. (5 Otto), 369, citing Louisville, &c. R. R. v. County Court of Davidson, 1 Sneed. 638; Taylor v. Taylor, 10 Minn. 107; People v. Warfield, 20 Ill. 159; People v. Garner, 47 Ill. 246; People v. Weant, 48 Ill. 263. See also County of Cass v. Jordan, 95 U. S. (5 Otto), 372.

[4] See Harshinar v. Bates County, 92 U. S. (2 Otto), 569, and opinion of Bradley, J., in County of Cass v. Johnson, 95 U. S. (5 Otto), 370.

[5] See State v. Wenkelmeier, 35 Mo. 103; State v. Sutterfield, 45 Mo. 391.

they are more consistent with popular right which should be the touchstone of construction in all matters touching the purse of the people. It has been well said: "The people who are to pay the taxes and ought not to be subjected to that burden unless the requisite majority of the class named, that is the qualified voters, can be induced to give their assent to it. In the one case, as in the other, absence and failure to vote is equivalent to a dissent."[1]

§ 1536. It has been held that, if a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority's vote is obtained, the municipal authorities, on proceedings to compel them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption, practiced and perpetrated by the railroad company and its employees.[2] The taxpayers of the municipality may also enjoin the proceedings of the corporate authorities to carry out the subscription on the ground of fraud, bribery, nonfulfillment of pre-existing conditions, or other sufficient cause; but they must do so, if at all, in apt time, and before the rights of *bona fide* third parties have accrued.[3]

SECTION III.

POWER OF A MUNICIPAL OFFICER OR AGENT TO BIND THE MUNICIPALITY; VIEWS OF THE UNITED STATES SUPREME COURT.

§ 1537. The Supreme Court of the United States has enunciated the following doctrines on this subject as applicable to corporations private and public, which we shall divide into two series. The *first* series are as follows:

[1] Dissenting opinion of Bradley, J., in County of Cass v. Johnson, 95 U. S. (5 Otto), 371.

[2] People v. Supervisors, 27 Cal. 655.

[3] Butler v. Dunham, 27 Ill. 477, 478; Prettyman v. Supervisors, 19 Ill. 406; Steines v. Franklin County, 48 Mo. 176.

First: Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority, or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.[1]

Second: When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.[2]

Third: That, where negotiable bonds or securities on their face import by recitals a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of compliance with the conditions annexed to the grant of power to issue them.[3]

Fourth: That, if it appears to have been the sole province of the officers who execute and issue the bonds or securities to decide whether or not there has been antecedent compliance with the regulation, condition, or qualification prescribed to their authority, their determination that there has been such compliance and declaration to that effect is sufficient, and cannot be impugned as against a *bona fide* holder.[4]

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[1] Merchants' Bank v. State Bank, 10 Wall. 644.

[2] Gelpcke v. City of Dubuque, 1 Wall. 203; Moran v. Miami County, 2 Black, 725; Supervisors v. Schenck, 5 Wall. 784; The Mayor v. Lord, 9 Wall. 414; City of Lexington v. Butler, 14 Wall. 296. See, also, San Antonio v. Lane, 32 Tex. 414; County of Henry v. Nicolay, 95 U. S. (5 Otto), 626.

[3] Mercer County v. Hacket, 1 Wall. 93; Commissioners of Knox County v. Aspinwall, 21 How. 545; St. Joseph Township v. Rogers, 16 Wall. 659; Pendleton County v. Amy, 13 Wall. 305; Bissell v. Jeffersonville, 24 How. 287; Moran v. Miami County, 2 Black, 722; Grand Chute v. Winegar, 15 Wall. 372; Larned v. Burlington, 4 Wall. 276, 277; Lynde v. County, 16 Wall. 6; Kennicott v. Supervisors, 16 Wall. 464; San Antonio v. Meharty, 96 U. S. (6 Otto), 313; Township of Rock Creek v. Strong, 96 U. S. (6 Otto), 277; Commissioners v. January, 94 U. S. (4 Otto), 202.

[4] Town of Coloma v. Eaves, 92 U. S. (2 Otto), 491; Town of Venice v. Mur-

Fifth: That, from the mere fact that the bonds or securities are issued and subscribed to the object of their issue, the purchaser has a right to assume that the conditions precedent to the right to issue have been fulfilled.[1]

Sixth: That, if the legal authority be sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with.[2]

Seventh: That, if there be lawful authority for the corporation to issue the bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the corporation issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them.[3]

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dock, 2 Otto (92 U. S.), 496; Town of Genoa v. Woodruff, 2 Otto (92 U. S.), 502; Commissioners v. Bolles, 4 Otto (94 U. S.), 104; Commissioners v. January, 94 U. S. (4 Otto), 202; St. Joseph Township v. Rogers, 16 Wall. 659, Clifford, J.; Kennicott v. Supervisors, 16 Wall. 464, Hunt, J.; Lynde v. County, 16 Wall. 13, Swayne, J.: "It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final." See, also, Bank of Rome v. Village of Rome, 19 N. Y. 20; Commissioners of Knox County v. Nichols, 14 Ohio St. 271. In Town of Coloma v. Eaves, 2 Otto (92 U. S.), 491, Strong, J., quoting Dillon on Municipal Corporations, § 419, says: "After a review of the decisions of this court, the author remarks, 'if upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of a bondholder for value, bind the corporation.' This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

[1] Commissioners of Knox County v. Aspinwall, 21 How. 544; Meyer v. Muscatine, 1 Wall. 393.

[2] Meyer v. Muscatine, 1 Wall. 393; Grand Chute v. Winegar, 15 Wall. 373.

[3] Kennicott v. Supervisors, 16 Wall. 465; Town of East Lincoln v. Davenport, 94 U. S. (4 Otto), 801.

§ 1538. But the effect of its decisions is to qualify these doctrines by a second series of propositions as follows:

First. That where the power on the part of the corporation officers to make the contract for the corporation never existed, negotiable securities issued by them, are invalid in the hands of all persons, even innocent purchasers.[1]

Second. That there can be no ratification, save by those who are capable to contract, nor of contracts, save of those which it is competent for them to perform.[2]

§ 1539. Manifesting a stern resolution to sustain the rights of *bona fide* holders of corporate securities, that tribunal has applied the first series of propositions in numerous cases. In one of them which is generally quoted as a leading case,[3] suit was brought by a *bona fide* holder for value of coupons, attached to bonds of Knox county, Indiana, which had been given in subscription to stock of a railroad company. The board of county commissioners had been authorized by act of assembly to take stock in the railroad, payable in county bonds, "provided a majority of the qualified voters of said county, at any annual election, shall vote for the same." The bonds recited on their face, that they were issued by order of the commissioners in pursuance of the act of assembly providing for their issue; and the county resisted payment on the ground, that though a vote had been cast in favor of their issues at a popular election, the bonds were invalid, because the preliminary notices for the election prescribed by statute, had not been properly given. But the court declared them valid, on two grounds, and Nelson, J., said: (1) "This view would seem to be

[1] Town of South Ottawa v. Perkins, 94 U. S. (4 Otto), 260; McClure v. Township of Oxford, 94 U. S. (4 Otto), 432; Marsh v. Fulton County, 10 Wall. 683. See also Wilson v. City of Shreveport, 29 La. 673; Town of Middleport v. Ætna Life Ins. Co. 82 Ill. 562; Township of East Oakland v. Skinner, 94 U. S. (4 Otto), 257; Williamson v. City of Keokuk, 44 Iowa, 88.

[2] Marsh v. Fulton County, 10 Wall. 683; Boom v. City of Utica, 2 Barb. 105.

[3] Commissioners of Knox County v. Aspinwall, 21 How. 539; approved in DeVoss v. City of Richmond, 18 Grat. 356, 357; Steines v. Franklin County, 48 Mo. 179; Town of South Ottawa v. Perkins, 94 U. S. (4 Otto), 260.

decisive against the authority, on the part of the board to issue the bonds, were it not for a question that underlies it, and that is, who is to determine whether or not the election has been properly held? The right of the board to act in execution of the authority is placed upon the fact, that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it." (2) "Another answer," says the court, "to this ground of defense is, that the purchaser of the bonds had a right to assume, that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuing of the bonds. The bonds on their face import a compliance with the law under which they were issued. * * The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." Again, where bonds issued by county commissioners recited that they were issued by virtue of and in accordance with act of the legislature, and in pursuance of and in accordance with the vote of a majority of the qualified electors, the court said: "Behind such a recital, as we have seen a *bona fide* holder for value paid, is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies."[1]

§ 1540. So where the common council of Jeffersonville City were authorized to issue bonds for stock in a railroad company on the petition of three-fourths of the legal voters of the city, it was held that the city was precluded by the re-

[1] Commissioners v. Bolles, 94 U. S. (4 Otto), 109. See also Commissioners v. January, 94 U. S. (4 Otto), 202.

cital in bonds issued by the council, that such petition had been made, from showing the contrary against *bona fide* holders for value.[1] The like view was taken where authority was conferred on the council of Muscatine to borrow money upon a two-thirds majority in favor of the loan being cast at an election—but in this case it appears that such majority was cast.[2] So where a statute required the grand jury of a county to fix the amount of a county subscription to railroad stock, and on their report being filed empowered commissioners to make the subscription in the name of the county, it was held that where bonds issued by such commissioners were sued on by a *bona fide* holder, it was not necessary for him to show that the grand jury had fixed the manner and terms of paying for the stock, and that it would be no available defense to the county to show that the grand jury had omitted to do so.[3]

§ 1541. In another case where the action was on coupons payable to bearer, belonging to bonds issued by commissioners of Mercer county, it appeared that the commissioners were empowered to subscribe stock to a railroad company, and issue the bonds upon the following "restrictions, limitations, and conditions, and in no other manner or way, whatever." 1. "After and not before the amount of such subscription shall have been designated, advised and recommended by a grand jury of the county. 2. Said bonds shall in no case be sold by the railroad company at less than par. 3. Acceptance of the act should be deemed acceptance of another fixing the gauges of railroads in the county of Erie." The county resisted payment on the ground that although the grand jury had made a certain recommendation, it was not such a recommendation as the law required, and that they

[1] Bissell v. Jeffersonville, 24 How. 287 (1860). Similar view taken in Van Hostrup v. Madison City, 1 Wall. 297 (1863).

[2] Meyer v. City of Muscatine, 1 Wall. 393 (1863).

[3] Woods v. Lawrence County, 1 Black, 386; approved in Grand Chute v. Winegar, 15 Wall. 372 (1872). See to like effect Commissioners of Knox Co. v. Nichols, 14 Ohio St. 260.

had been sold below par. The bonds recited on their face that they were issued under authority of the act, and the court sustained their validity, Grier, J., saying: "We have decided that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." And he added, "Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions, and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators,' are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation after they have been negotiated and have come into the possession of *bona fide* holders."[1]

§ 1542. Again, upon a *mandamus* against the city of Davenport to compel a tax levy to pay a judgment on negotiable bonds, the court held the judgment conclusive as to their validity; but, in answer to the argument of counsel that they were issued without the prerequisite popular vote, the court declared that, as against an innocent purchaser, the city was estopped to deny compliance with the statute.[2] In another case, where the city of Lexington, Kentucky, was authorized to subscribe to a railroad on the condition of a majority vote, it appeared that the vote had been cast, but the city had embodied the condition in the proposition submitted that $1,000,000 should be first subscribed by other

[1] Mercer County v. Hacket, 1 Wall. 96 (1863); approved in Grand Chute v. Winegar, 15 Wall. 372 (1872).

[2] Mayor v. Lord, 9 Wall. 414 (1869).

parties before its officers should subscribe to the stock or execute the bonds. The city refused to subscribe, but was directed by *mandamus* from an inferior court to do so. It then appealed, and the Court of Appeals of Kentucky reversed the decision; but meanwhile the bonds were issued, signed by the mayor and clerk, reciting due compliance with the act of assembly, and came into the hands of a *bona fide* holder. And the court sustained their validity on the like grounds, as in the preceding case cited.[1] In another case, in an action brought on certain coupons of bonds of the town of Coloma, there was a recital on the bonds that they were issued in accordance with a vote of the electors of said township of Coloma, signed by a supervisor and town clerk, and recovery was resisted mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the subscription for which the bonds were issued. It was held, that the recital estopped the town from the defence offered to be made.[2] Again, where the law under consideration provided that the amount of bonds sold by any township, should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of the township to pay the interest, and objection was made that the issue of the bonds in controversy was in excess of this amount, the Court said that the extrinsic facts were referred to the inquiry and determination of the Board of County Commis-

[1] City of Lexington v. Butler, 14 Wall. 296 (1871.) Judge Dillon says in his Treatise on Municipal Corporations, vol. 1, § 442 *a*, p. 518 (2d ed.): "The substance of the decision of the United States Supreme Court in this case would seem to be that a *bona fide* purchaser of the bonds had a right to presume that the condition annexed by the city as to the $1,000,000 of other subscriptions had been complied with, and thus viewed, the judgment of the court rests upon grounds whose soundness cannot admit of question. It is not an authority upon its essential facts in favor of the proposition that, if the bonds had been issued without any vote, or attempt at a vote, they would have been binding in the absence of estoppel other than by recitals or other ground of liability."

[2] Town of Coloma v. Eaves, 2 Otto (92 U. S.) 484. See *ante*, § 1537 and note.

sioners, and were determined before the bonds came into the plaintiff's hands; and that "he was therefore not bound which he purchased, to look beyond the Act of the Legislature, and the recitals which the bonds contained."[1]

§ 1543. So it has been held that it was no defense against *bona fide* holders of railroad bonds that the mortgage given to secure them was executed out of the State, instead of in it, as should have been the case.[2] So that, where there had been a popular vote in favor of a county subscription, the county could not resist payment of bonds issued in pursuance thereof, on the ground that the election had been ordered by the county court instead of by the board of supervisors, as provided by law.[3] So that, where the town of Grand Chute had been authorized to subscribe not exceeding $10,000 to a plank-road company, in such amounts "as may be declared by the board of directors of said company necessary to the completion of said road at the time of such subscription," it could not resist payment of bonds issued by the supervisors, on the ground that the directors had not declared the amounts necessary, the bonds importing on their face compliance with the act.[4]

§ 1544. Illustrating the *second* series of propositions: It appeared that the Legislature of Illinois had authorized a county subscription to be made to any railroad corporation of the State, provided that a majority of the qualified voters of the county should vote for the same, and required that the notices calling for the election should specify the company in which stock was proposed to be subscribed. The powers of the county were only to be exercised by the board of supervisors, or by resolution by them adopted. The voters of the county authorized a subscription to the "Mississippi and Wabash R. R. Company," and to the "Petersburgh and

[1] Marcy v. Township of Oswego, 2 Otto (92 U. S.) 641. See also, Humboldt Township v. Long, 2 Otto (92 U. S.) 645. But see Mosher v. Ind. School District, 44 Iowa, 122.

[2] Galveston R. R. v. Cowdrey, 11 Wall. 478 (1870).

[3] Supervisors v. Schenck, 5 Wall. 773.

[4] Grand Chute v. Winegar, 15 Wall. 355 (1872).

Springfield Company," and the supervisors authorized their clerk to issue the bonds to the first named corporation. The clerk of the county court, acting as their clerk, issued bonds to "The Central Division of the Mississippi and Wabash R. R. Company," which was a different corporation from the original company. By various acts the supervisors recognized the validity of these bonds by allowing interest on them, levying a tax to meet it, and appointing agents to represent the stock received by the county for the bonds in the corporate meetings, and also paid two of the bonds in full. The Supreme Court held the bonds invalid on the ground that the supervisors, having had no authority to issue the bonds to the corporation, because the condition precedent of a popular vote had not been fulfilled, could not, therefore, by any act ratify the subscription when made by their clerk.[1] The fact that the act under which bonds are

[1] Marsh v. Fulton County, 10 Wall. 683 (1870), Field, J., delivering the unanimous opinion, saying: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd Acceptances. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the Court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.' It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification

issued is erroneously referred to in their recital, will not render them void.[1]

§ 1544 *a*. A township has no inherent power to contract debts, and issue coupon bonds, and a statute declaring it "lawful for the agent of any corporate body" to subscribe to a railroad, will not create such a power in such a municipal organization. Such a provision, it has been held, manifestly referred to private corporations.[2]

SECTION IV.

HOW INVALIDITY OF THE BOND IS CURED BY ACQUIESCENCE OR RATIFICATION OF THE MUNICIPALITY.

§ 1545. There are four ways, according to the decisions of the United States Supreme Court and of some of the State courts, in which a municipal corporation may estop itself

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is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. They could not therefore ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts when they were directly, in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way." See also Bissell v. City of Kankakee, 64 Ill. 249; McClure v. Township of Oxford, 94 U. S. (4 Otto), 432.

[1] Commissioners, &c. v. January, 94 U. S. (4 Otto), 202.

[2] Township of East Oakland v. Skinner, 94 U. S. (4 Otto), 257.

from objecting to the validity of corporate securities: (1) By its members failing to interfere and enjoin their issue when they are about to be executed, and thereby acquiescing.[1] (2) By their submitting to taxation to pay them.[2] (3) By their voting for or submitting to the payment of principal or interest by the corporate officers.[3] (4) By receiving and keeping the proceeds or benefits of them.[4]

§ 1546. Where county bonds had been issued for railroad stock, but their validity was objected to, because the election, at which the popular vote was in their favor, had been ordered by the wrong authority; but taxes had been levied and interest paid on them for nine years, the court said, per Clifford, J.:

"Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of this kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract; and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds, by voting taxes for the payment of the accruing in-

[1] Supervisors v. Schenck, 5 Wall. 581. In Kentucky it has been held that parties are estopped from denying the constitutionality of a statute by participating in procuring its passage, acquiescing or approving of it, or by receiving benefits under it; although others may impeach its validity. Ferguson v. Landram, 5 Bush (Ky.) 231.

[2] State v. Van Horne, 7 Ohio St. 331; Shoemaker v. Goshen Township, 14 Ohio St. 587.

[3] Supervisors v. Schenck, 5 Wall. 581. To same effect, see Mercer County v. Hubbard, 45 Ill 142; Keithsburg v. Frick, 34 Ill. 421, Breese, J.; Shoemaker v. Goshen Township, 14 Ohio St. 587; Hannibal, &c. R. R. Co. v. Marrion County, 36 Mo. 295. See also, County of Ray v. Vansycle, 96 U. S. (6 Otto), 687.

[4] Supervisors v. Schenck, 5 Wall. 581; Pendleton County v. Amy, 13 Wall. 305. To same effect, see State v. Trustees of Union Township, 8 Ohio St. 403; State v. Van Horne, 7 Ohio St. 331; Barrett v. County Court, 44 Mo. 199. See also, County of Ray v. Vansycle, 96 U. S. (6 Otto), 687.

terest, and have actually paid the same to the amount of six thousand dollars."

And the principle is stated to be, that "where the officers of the corporation openly exercise powers affecting the interests of third persons, which pre-supposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."[1]

§ 1547. So where a county received, and retained for seventeen years, stock in a railroad company, the court said it thereby estopped itself from asserting that it was issued by officers in disregard of conditions precedent to their authority.[2] And the doctrines here stated have been adopted

[1] Supervisors v. Schenck, 5 Wall. 781.

[2] Pendleton County v. Amy, 14 Wall. 305, 306, Strong, J., saying: "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that, when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser, by proof that the county officers or the people have not done, or have insufficiently done, the things which the Legislature required to be done, before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor; and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases; but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case, it does not appear in the pleadings whether or not the bonds con-

in other cases.[1] But these doctrines are subject to this general limitation, or qualification: that in order to be capable of ratification, the bonds must be such as come within the constitutionally conferred powers of the municipality issuing them; and if the powers assumed to be conferred by the legislature were not such as it had the right to confer, for instance, if they were to be exercised in aid of a private instead of a public object, the bonds given to carry them out would be totally void and incapable of ratification by payment of interest by the municipality participating in stockholders' meetings upon the stock acquired by them, or even by a vote of the majority of the suffragans.[2]

§ 1548. In Ohio, where the tax-payers of a township made no objection to the validity of a subscription to a railroad corporation until three or four years had elapsed thereafter, and during that period submitted to taxation and the payment of interest on the bonds issued under it, it was held that they could not then object to the validity of the bonds which had passed into the hands of *bona fide* holders.[3] So

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tained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up non-compliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value, that though the Legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained."

[1] Rogers v. Burlington, 3 Wall. 667; Meyer v. Muscatine, 1 Wall. 382; Commissioners v. January, 94 U. S. (4 Otto), 206.

[2] Weismer v. Village of Douglas, 11 N. Y. S. C. (4 Hun), 202.

[3] State v. Van Horne, 7 Ohio St. 331, Swan, J.: "If the location of the road should have been first made, any tax-payer of the township, for himself and all others interested, could, at any time before the issuing or negotiation of the bonds, have intervened and enjoined their issue as unauthorized, on account of the road not having been located. They, however, either intentionally or from

in Missouri, where a county voted for twelve years on stock

neglect to assert their legal rights, and without protest or interference, suffered the election to take place, their public agents, the trustees, to subscribe for stock, to issue the bonds and receive the proceeds. They also afterward, and for the period of three or four years, paid the interest by taxation, and thus gave credit to the bonds of the township. They now desire to retain the money of the original bondholders, refuse to pay interest, deny their obligations to pay back the principal, disaffirm the acts of their public agents, who, under the forms of law and by their direct instigation through the ballot-box, issued and negotiated these bonds. They had an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings, and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so, as against innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own. It is true, that when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void; and this principle would be applicable to the case before us, if the trustees had derived their sole authority to make the contract under consideration from the law, without any interposition, sanction or authority from the tax-payers of the township. But, in the case before us, the trustees derived their authority to subscribe for the stock of the railroad, and to issue the bonds, specifically, from their constituency, the tax-payers of the township. The trustees, unless authorized by the tax-payers, derived no authority to act from the laws under consideration. In fact, the whole transaction under the legislation was for the purpose of consummating an agreement, having all the substantial elements of a private contract, between the tax-payers as principals, who by vote made the trustees their agents to contract for them, on one side, and the railroad and bondholders on the other. The rules of law applied to individuals, and founded upon the clearest principles of justice and sound morals, should be equally applicable to these parties. The tax-payers, as principals, and by their votes, in the forms of law, set their agents in motion, professed to clothe them with special authority to make a special contract with third persons, for their benefit; by voting, instigated those agents to make the subscription and issue the bonds; and thus induced, on the faith of this recognition, innocent third persons to part with their money and receive, in lieu thereof, these bonds. If the trustees of the township and the tax payers supposed, until very recently, as they probably did, that the subsequent permanent establishment and location of the railroad through the township was sufficient to authorize the issuing of the bonds, whether that location was made before or after the election, it is equally just to presume that the bondholders, who parted with their money, entertained the same belief. The one were certainly as much bound to know as the other; and if both were mistaken, no principle of law or justice would demand that the tax-payers should retain the fruits of the mistake, and, at the same time, repudiate those very acts of their own which misled the bondholders, and induced them to part with their money; in truth, blowing hot to get the bondholders' money, and blowing cold to rid themselves of the obligation to refund it."

subscribed for in a railroad company, it was held it could not object to the validity of bonds issued therefor.[1] So in Kansas, where the failure of a railroad company to complete a specified number of miles of its work, within a given time, was set up to defeat bonds issued in aid of it, by commissioners of a county who waived the matter of time, the bonds were held valid, the public having had notice, and acquiescing, and interest having been paid for two years.[2] Where a county in Illinois subscribed to stock in a railroad company, and agreed to extend the time for completing the road from that originally fixed, to a particular date, and before that date, by its proper officers, declared the road completed to its satisfaction, delivered its bonds, and received the stock subscribed for, the Supreme Court of the United States held that its action constituted a waiver and estoppel, which prevented it from raising the objection that the contract was not performed in time.[3]

§ 1549. An examination of the authorities which have been cited shows that the doctrines which they announce have been met with very general acceptation, and that equitable estoppel is applied very freely to the enforcement of municipal obligations. It would seem to us that, it should appear in all cases where it is appealed to to silence any citizen of the municipality in his plea that the security was illegally issued, that he had a fair opportunity to know the facts, and had willingly neglected to assert his rights. In other words, his acquiescence or ratification, should be made, under all the circumstances, essential to the validity of the ratification by a principal of the act of his agent, as elsewhere expounded.[4] Clearly no ratification could validate an unconstitutional act.[5]

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[1] Barrett v. County Court, 44 Mo. 201; Hannibal, &c. R. R. Co. v. Marion Co. 36 Id. 294; Steines v. Franklin County, 48 Id. 185.

[2] Leavenworth, &c. R. R. v. Commissioners of Douglas Co. 18 Kansas, 170.

[3] County of Randolph v. Post, 3 Otto (93 U. S.) 502.

[4] See Chapter X, Section V, pp. 259, *et seq.* vol. 1.

[5] Sherrard v. Lafayette Co. U. S. Dist. Ct. Dillon, J. Cent. L. J. May 28, 1875, p. 347. See *ante*, § 1547.

SECTION V.

CORRECT PRINCIPLES AS TO THE LIABILITY OF MUNICIPAL CORPORATIONS UPON NEGOTIABLE BONDS.

§ 1550. The principles respecting the liability of municipal corporations, which seem to us to be sustained by precedent and by reason, are these:

(1) That mere informalities or irregularities in the fulfillment of a condition precedent to a grant of power to an agent or officer, or in the exercise of that power when granted by the agent or officer, are immaterial.[1]

(2) That if a person is only to become the agent or officer of a municipal corporation, to do certain acts when a condition precedent has been fulfilled, such condition must be fulfilled in all substantial and material respects before such acts on his part will be binding on the corporation.[2]

(3) That no assumption or declaration by him that such condition has been fulfilled will have any effect when, in fact, it has not been fulfilled.[3]

(4) That if, however, the agent or officer is fully empowered to do certain acts by the corporation, but his in-

[1] This principle is universally admitted, and upon it some of the decisions of the U. S. Supreme Court are maintainable. Mercer County v. Hubbard, 45 Ill. 142; Smead v. Trustees Union Township, 8 Ohio St. 394; Steines v. Franklin County, 48 Mo. 179; Town of East Lincoln v. Davenport, 94 U. S. (4 Otto), 801.

[2] Lewis v. Commissioners of Bourbon County, Kansas (1873), Cent. Law Jour. Jan. 8, 1874, Brewer, J.: "Issuing bonds without a vote is no more *ultra vires* than issuing them against a vote of the majority."

In Cooley on Const. Lim. 215, it is said: "While mere irregularities of action, not going to the essentials of the power, would prevent parties who had acted in reliance upon the securities enforcing them, yet as the doings of these corporations are matters of public record, and they have no general power to issue negotiable securities, any one who becomes holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized."

[3] Gould v. Town of Sterling, 23 N. Y. 463; Clark v. Des Moines, 19 Iowa, 201; Treadwell v. Commissioners, 11 Ohio St. 183; Veeder v. Lima, 19 Wisc. 298; Wallace v. Mayor of San Jose, 29 Cal. 188; Cooley Const. Lim. 196. But see Bank of Rome v. Rome, 19 N. Y. 24.

structions are not to exercise that power save in certain contingencies, the corporation will be bound, though he violate such instructions, unless the fact that the contingency has not transpired be a matter of public record.[1]

(5) And (as it seems from the authorities) if it be the sole province of the officer or agent to ascertain whether or not the condition precedent to his authority has been fulfilled, or power is vested in him to exercise his own discretion, his decision becomes sole arbiter of the act, and cannot be reviewed or disputed.[2]

(6) That if the instrument refers on its face to a stat-

[1] In such cases, the officer stands on the footing of an agent who violates private instructions. The determination of a condition subsequent to an agency is very different from the determination of a condition precedent, for unless the condition precedent be fulfilled, the party is still a stranger, not an agent. City of Lexington v. Butler, 14 Wall. 296. See *infra*, § 1552; Cooley Const. Lim. 218, note.

In De Voss v. City of Richmond, 18 Grat. 338, it appeared that the city council directed its officers to issue a bond to the receiver of the Confederate States court, in lieu of one that had been confiscated, and provided in its resolution that in the books of its auditor it should be entered, and upon the face of the bond it should be shown that it was issued instead of the confiscated bond. The auditor issued a new bond, which did not contain upon its face the required statement, and it was passed to a *bona fide* holder for value and without notice. It was held that the city was bound upon it, although the Confederacy having fallen, it was bound also to pay the original bond which had been confiscated to its true owner. Joynes, J., said: "There was nothing to excite the holder's suspicion, or to put him upon inquiry. All that can be said is, that he might have ascertained the facts, if he had gone to the auditor's office and traced the bond back to its source. But that is not enough to charge him with constructive notice of what he might have ascertained, in the absence of anything to put him on inquiry." It will be seen, on examining the text of the case, that the power of the city to borrow money was very broad. The gist of the particular case has been considered to be simply that the purchaser of the bond was not obliged to take notice of the entries in the auditor's books, because they were private records "to which the public had no access." [See article in Southern Law Review, vol. I, 23, Jan. 1872, by Chancellor Cooper of Tennessee.] If they had been public records, the implication is that the purchaser would have been bound to take notice of them.

[2] Commissioners of Knox County v. Nichols, 14 Ohio St. 260; Bank of Rome v. Rome, 19 N. Y. 24; Commissioners of Knox County v. Aspinwall, 21 How. 539, Nelson, J.; Lynde v. County, 16 Wall. 13; St. Joseph Township v. Rogers, 16 Wall. 659; Kennicott v. Supervisors, 16 Wall. 464.

utory power, every holder is made chargeable thereby with notice of such statute and its limitations.[1]

(7) That if the right of the officer or agent to bind the corporation is a matter which may be ascertained by an inspection of public records, the holder of any instrument issued by him is chargeable with notice of all facts which appear on such records.[2]

(8) That the powers of municipal corporations, which are special governmental agencies, and of their officers, who are their special agents, are to be strictly construed.[3]

§ 1551. Conforming to the doctrines of the text, it has been decided that where an election was made a condition precedent to the right of a county to issue bonds—and no election was held—the bonds issued were void.[4] So where it was provided "that no subscription or purchase of stock should be made, or bonds issued by any county or city, unless a majority of the qualified voters of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority, were absolutely void in whosesoever hands they might fall, and were not validated by the levy of taxes, and the payment of interest thereon.[5] So where the common council were empowered by the legislature to create a debt only when "there should be sufficient moneys to meet the

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[1] Fisk v. City of Kenosha, 26 Wis. 29; City of Aurora v. West, 22 Ind. 89; Louisiana State Bank v. Orleans Nav. Co. 3 La. An. 295; McClure v. Township of Oxford, 94 U. S. (4 Otto), 429; Silliman v. Fredericksburg, &c. R. R. 27 Grat. 119.

[2] Bissell v. City of Kankakee, 64 Ill. 249; Clark v. Des Moines, 19 Iowa, 201; De Voss v. Richmond, 18 Grat. 338; Gould v. Sterling, 23 N. Y. 463; Duanesburg v. Jenkins, 40 Barb. 579; Veeder v. Lima, 19 Wis. 298; Backman v. Charlestown, 42 N. H. 125; Lewis v. Commissioners of Bourbon County, Kansas (Cent. Law Jour. 8 Jan. 1874); Cooley Const. Lim. 215.

[3] Veeder v. Lima, 19 Wis. 291; Treadwell v. Commissioners, &c. 11 Ohio St. 190.

[4] Steines v. Franklin Co. 48 Mo. 167; Flagg v. Palmyra, 33 Mo. 40, is qualified and explained.

[5] Marshall Co. v. Cook, 38 Ill. 44. See Town of Eagle v. Kohn, 84 Ill. 292, where it is held that if conditions precedent be subsequently complied with, bonds issued are valid.

same after paying the expenses of the government, and all other demands legally due," it was held that unless such conditions were actually fulfilled, the contract of the council to pay a certain amount in future was void.[1] So where county commissioners were authorized to borrow money, issue bonds, and to subscribe to a railroad company running through or in the county, it was held in an action on the bonds, it was a valid defense to show that the railroad was so located as not to touch the county.[2] So where a county had authority to issue bonds provided that sanction was given at a previous election upon thirty days' notice, it was held that although there was an election, the issue of the bonds might be enjoined because due notice was not given.[3] So if the election be held before the Act of the Legislature authorizing it, takes effect, it has been held premature, and the bonds issued under the act, void;[4] and so if the vote be taken merely voluntarily, and not in conformity with the statute.[5]

§ 1552. In New York, where a town was authorized to borrow money to subscribe for stock in a railroad corporation, provided the written assent of the resident tax-payers were obtained, it was held that bonds issued without such condition being fulfilled would be void;—that it was incumbent on the holder to show that such condition was fulfilled; and that the statement of the town officers that it was ful-

[1] Wallace v. Mayor of San Jose, 29 Cal. 188, the Court saying: "The common council were the agents of the corporation, and their authority was special and their power distinctly circumscribed. The corporation could not become bound by the contract unless it was made by the mayor and council in the exercise of the power delegated by the act of incorporation, and within its limits. In dealing with these officers the plaintiff was bound to know the extent of their power, and to see that the condition, on which alone it could arise and subsist, had existence. The fact that these officers assumed to make the contract, and thus bind the corporation, did not create the presumption that they possessed the power which they attempted to exercise, for no officer can acquire power or jurisdiction by the mere assertion of it."

[2] Treadwell v. Commissioners, 11 Ohio St. 183.

[3] Harding v. Rockford, &c. R. R. Co. See Dillon on Corporations, § 108, p. 229, Vol. 1. See also Portland, &c. R. R. Co. v. Hartford, 38 Me. 23.

[4] State of Arkansas v. Little Rock, &c. R. R. 31 Ark. 701.

[5] Barnes v. Town of Lacon, 84 Ill. 461.

filled, operated no estoppel against the town, their own authority being dependent on its fulfillment.[1] The two cases

[1] Starin v. Town of Genoa, 23 N. Y. 440; Gould v. Sterling, 23 N. Y. 456. In the latter case, p. 463, Selden, J., said: "The estoppel contended for is supposed to result from that rule of the law of principal and agent in accordance with which it is held that, where a power is conferred, if the agent does an act which is apparently within the terms of the power, the principal is bound by the representation of the agent as to the existence of any extrinsic facts essential to the proper exercise of the power, where such facts from their nature rest peculiarly within the knowledge of the agent. This is the doctrine asserted in the case of Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank (16 N. Y. 125). No representation of the agent as to the fact of his agency, or as to the extent of his power, is of any force to charge the principal. But, it being shown by other evidence that the agency existed, and that the act done was within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining." "The reason upon which this rule is founded is that given by Lord Holt, in Hern v. Nichols (1 Salk. 289), viz., that, where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has himself employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated, not by the town, but by the Legislature; and no power whatever was conferred by the town, unless the assent of the tax-payers was obtained. Any representation, therefore, by the supervisor and commissioners in respect to such assent would be a representation as to the very existence of their power. Such representations, as we have seen, are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank has no application to the present case."

"It is also inapplicable for another reason. Knowledge of the facts in regard to the assent of the tax-payers was in no manner peculiar to the supervisor and commissioners, but was equally accessible to the parties receiving the bonds. The statute, of which they were bound, of course, to take notice, apprised them that the bonds could not be legally issued until the requisite assent was obtained, and also that the assent, when obtained, would be placed upon the files of the county. The case is not, therefore, at all like that of the Butchers' & Drovers' Bank, where the extrinsic fact related to the state of the accounts of the bank with one of its customers, which could only be known to the teller and other officers of the bank. Here the parties who received the bonds had the means of ascertaining, and where bound to inquire, as to the existence of the facts upon which, as they knew, the validity of the bonds depended."

"The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most, if not all, the attributes of commercial paper. But one who takes a negotiable promissory note or bill of exchange purporting to be made by an agent, is bound to inquire as to the power

in which these views are expressed admirably expound the law of the subject, and have been quoted with deserved approval in other cases.[1]

§ 1553. But if the certificate of the municipal officers or agents were made by statute conclusive evidence of the facts stated therein, and were required by statute to be filed, as a matter of public record, it seems that it would then operate as conclusive evidence in any suit upon a bond or other security issued in conformity with it, as to the facts which it verifies. In such a case the municipality and all its citizens are given notice by the statute that such certificate when filed will be taken as conclusive evidence against them. And it becomes accordingly their duty to watch for its appearance, and to take steps to prevent the issue of the securities based upon it. If they remain quiescent they are estopped, after the securities have been issued, and the rights of *bona fide* holders have accrued, from making objection.[2]

§ 1554. In Ohio, where it was provided that the county commissioners should not deliver the bonds subscribed "un-

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of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected, because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts, of itself, in such a case, to a representation by the agent to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence of the power itself. In that respect the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognizance of facts which the other cannot be presumed to have known." The Supreme Court of the United States dissents from the views taken in New York. See Town of Venice v. Murdock, 2 Otto (92 U. S.) 496; Town of Genoa v. Woodruff, 2 Otto (92 U. S.) 502, and *ante*, § 1537 and note.

[1] Veeder v. Lima, 19 Wisc. 280; Duanesburg v. Jenkins, 40 Barb. 579; The People v. Mead, 24 N. Y. 115; 36 N. Y. 229; Lewis v. Comm'rs of Bourbon Co. (Kan.) Cent. Law Jour. Jan. 8, 1874.

[2] Bank of Rome v. Village of Rome, 19 N. Y. 23 (1859); Veeder v. Lima, 19 Wisc. 299; see Commissioners of Knox County v. Aspinwall, 21 How. 539; Huedekoper v. Buchanan County (U. S. C. C.) Cent. Law Jour. April 9, 1874, p. 177.

til a sufficient sum shall be provided by other subscriptions or otherwise, to insure a continuous railroad connection from Mt. Vernon to Pittsburg," it was held that whether or not such sum was provided, was a matter left entirely to the judgment of the commissioners to determine; and that having issued the bonds it was absurd to suppose that their legality could turn upon a subsequent inquiry into that question.[1]

§ 1555. In Wisconsin it appeared that the supervisors of a town were authorized to subscribe to a railroad company, but the question was first to be submitted to popular vote upon written application of ten or more electors, and after certain prescribed notice. The affidavit of the supervisors of the posting of notice was to be deposited and recorded, with the application aforesaid, in the office of the town clerk, and they or certified copies were to be received in the courts of the State as conclusive evidence of the facts stated. In an action on bonds issued, which recited upon their face that the voters of the town had authorized the subscription, it further appeared that notice was not given, nor the election held in conformity with law, nor was the application and the affidavit above mentioned on record as provided. It was held that the absence from the office of the town clerk of these evidences of the validity of the bonds, put all holders upon inquiry; and that the town was not bound upon the bonds. And the principle was declared that "when the appointment and limitation of the agent's authority is duly recorded, a party dealing with him must be deemed to have constructive notice of such limitation."[2]

In Louisiana, where suit was brought against the city of New Orleans upon its indorsement of a negotiable bond, it was held that the words "in conformity with resolutions of the council of said municipality, bearing date the 29th July and 5th August last," written in the body of the bond,

[1] Commissioners of Knox County v. Nichols, 14 Ohio St. 271.

[2] Veeder v. Town of Lima, 19 Wisc. 291; Backman v. Charlestown, 42 N. H. 125.

charged all parties with notice of the authority granted by such resolutions; and as the bond was indorsed in excess of such authority, it was void.[1] In New York a case arose in which it appeared that a railroad company issued bonds designated as "consolidated first mortgage gold bonds," referring to the mortgage which showed that they were intended for certain purposes, and it was held that the quoted words put a purchaser on inquiry as to the statements of the mortgage.[2]

§ 1555 *a*. Where a statute points out a particular course to be pursued, it must be followed; and if the statute authorize levy of a special tax to liquidate a debt, it will not be construed to authorize issue of interest-bearing obligations.[3] But substantial compliance with the statute is all that is needful.[4]

§ 1555 *b*. An interesting case arose in Illinois, where a municipal corporation, without express authority to do so, issued bonds simply as a donation to the Douglas Linen Company. They were sued on by a *bona fide* holder for value. The Supreme Court of that State held that the city of Kankakee, the defendant municipality, was not bound, Scott, J., saying: "The authority of a municipal corporation to issue bonds is derived from public laws, and the avenues to information in regard to the law and ordinances of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken. The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful

[1] Louisiana State Bank v. Orleans Nav. Co. 3 La. Ann. 297.
[2] Cuylas v. N. Y. & S. R. R. 17 N. Y. S. C. (10 Hun), 295.
[3] County of Hardin v. McFarlan, 82 Ill. 138.
[4] People v. Holden, 82 Ill. 93.

right to issue them, for the reason that its authority, if any existed, was to be found in public statutes, and if they did not in fact examine, as it was their privilege to do before buying, they will be presumed to have done so, and to have known that they were issued without authority of law, and therefore void in the hands of any holder, either with or without notice."[1]

SECTION VI.

LEGISLATIVE CONTROL OVER MUNICIPAL OBLIGATIONS.

§ 1556. In the *first place: may the legislature compel a municipal corporation to discharge an indebtedness which it did not contract?*—The affirmative of this proposition is sustained by numerous cases which assert the legislative authority to exist in its right to apportion, assess and levy taxes for the purposes of government. Their theory is this: taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use under the right of eminent domain, is not taken as the owner's contributive share of a public burden, but as so much beyond and above that share, and therefore cannot be taken without just compensation. It belongs to the legislature to apportion the taxes necessary to defray a public expenditure, amongst those who derive benefit from it; and if a public improvement benefit a particular locality, that locality, whether incorporated or not, may be made to bear the burden of paying for it.[2] Thus, in Illinois, it has been held that the legislature may appoint a board of commissioners and authorize them to levy a tax upon all taxable property in a certain precinct, "for the purpose of maintaining the bridge across

[1] Bissell v. City of Kankakee, 64 Ill. 249.

[2] Langhorne v. Robinson, 20 Grat. 661; People v. Lawrence, 41 N. Y. 137; 36 Barb. 177; Blanding v. Burr, 13 Cal. 343. See County Judge v. Shelby R. R. Co. 5 Bush, 225.

Rock river, at Rockford, and to defray the debt incurred in its erection and repair."[1] Caton, J., said: "It will hardly be denied that the legislature has a right to impose a local tax upon a city or town, a precinct or county, for some local improvement, as the erection of a bridge or the repair of a road. In doing this, to be sure, it cannot say that one man shall pay all and the others none, or that one shall pay one dollar and another ten, for the tax must still be uniform, and upon the value of the property which each one has, so that the burden presses alike upon the whole community. But the legislature must necessarily have the right to say how large that community thus subject to the tax shall be, whether a city or one of its wards, or a precinct, a county, or the whole State. If the legislature had the right to impose this tax to build a bridge, it would be equally lawful to purchase one, or pay for one already constructed for the public accommodation." So it has been held in New York, that where certain citizens of Utica had executed a bond to the State for $38,615, to defray the extra expenses of terminating the Chenango canal at that place, the legislature might impose a tax on the city of Utica to pay it.[2] So in Pennsylvania, that the legislature may compel a municipal corporation to build a bridge over a stream, or may itself appoint agents of its own to build it, and to borrow money for that purpose, payable by the corporation.[3] (But in a previous case, the right of the legislature to require a township to refund money voluntarily paid by a bounty association was denied.)[4] There are numerous other cases holding that the legislature may, under its taxing power, require municipalities to pay debts which in its judgment are morally charge-

[1] Shaw v. Dennis, 5 Gilm. (Ill.) 416.

[2] Thomas v. Leland, 24 Wend. 65 (1840). (Judge Cooley thinks this case extreme. Cooley Const. Lim. 380, note); approved in Philadelphia v. Field, 58 Penn. St. 320.

[3] Philadelphia v. Field, 58 Penn. St. 320 (1868), Thompson, C. J., and Sharswood, J., dissenting.

[4] Tyson v. School Directors, 51 Penn. St. 21 (1865), Thompson, C. J.

able upon them.[1] But it cannot compel a municipal corporation to make a contract, or to assume a contract already made.[2]

§ 1557. *In the second place: can the legislature authorize the officers of a municipal corporation to contract a corporate debt without a popular vote in its favor?*—There are many cases which declare[3] and determine[4] that the legislature possesses this power. "The legislature of a State," says Davis, J., delivering the opinion of the United States Supreme Court, "unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained either with or without the sanction of the popular vote."[5] It has also been held that the legislature may confer authority to levy a tax upon the people and property of a municipal corporation for a public purpose, without a popular vote, upon school or other commissioners appointed for that purpose;[6] upon the county court, though it be not

[1] Guilford v. Supervisors of Chenango Co. 3 Kern. (13 N. Y.) 143; Blanding v. Burr, 13 Cal. 343; Brewster v. Syracuse, 19 N. Y. 116; Lycoming v. Union, 15 Penn. St. 166.

[2] Hasbrouck v. Milwaukee, 13 Wisc. 38, explained in Mills v. Charleston, 29 Wisc. 37. In Town of Queensbury v. Culver, 19 Wall. 91, Strong, J., said: "It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company, is not a legitimate exercise of legislative power, and that it is not even an act of legislation. This was decided by the Court of Appeals of New York in the case of the People *ex rel.* v. Batchellor, 8 Albany Law Journal, 120." In People v. Batchellor, reported in 53 N. Y. 128 (1873), it was held that municipal corporations may be compelled to enter into contracts for an exclusively public purpose, but not into those partially or wholly of a private nature.

[3] Thomson v. Lee County, 3 Wall. 327–330; Aurora City v. West, 22 Ind. 89; St. Joseph Township v. Rogers, 16 Wall. 664.

[4] First Municipality v. Orleans Theater Co. 2 Rob. (La.) 209.

[5] Thomson v. Lee County, 3 Wall. 330 (1865).

[6] Bull v. Read, 13 Grat. 78; Shaw v. Dennis, 5 Gilm. (Ill.) 416; People v. Lawrence, 41 N. Y. 137; Langhorne v. Robinson, 20 Grat. 666.

elected by the people;[1] upon a common council;[2] or upon any local authorities or individuals that the legislature may select.[3]

[1] Case of Levy, 5 Call, 139; Harrison County Justices v. Holland, 3 Grat. 247; Langhorne & Scott v. Robinson, 20 Grat. 661. See Foster v. Callaway County (U. S. C. C.), Central Law Journal, May 28, 1874, p. 263.

[2] Langhorne v. Robinson, 20 Grat. 661.

[3] Shaw v. Dennis, 5 Gilm. (Ill.) 416; Langhorne v. Robinson, 20 Grat. 664, Joynes, J., delivering the opinion of the court (in which Moncure, P., Christian and Anderson, JJ., concurred; Staples, J., dissenting), wherein he said: "The legislature is vested by the Constitution with all legislative power, except so far as the exercise of any such power is prohibited or restrained by that Constitution, or by the Constitution of the United States. It may authorize the authorities of a county or city to impose a tax for a purpose of special interest to their people, though it is likewise of such general and public interest as to authorize a tax on the people of the whole State. Goddin v. Crump, 8 Leigh, 120. A power which it might thus delegate it might exercise itself. The whole power of taxation belonged, under the Constitution, to the legislature; a city or county had none, except such as the legislature might choose to give it. From considerations of policy and convenience, the power of local taxation has usually been conferred upon those municipal bodies or their officers. Where the power of laying a tax has been delegated to such local authorities, they may, in strictness of language, be said to be 'representatives' of the people, by whom the tax is imposed within the language of the Bill of Rights, provided they are eligible by the people. And yet in a legal sense, the tax in any such case is imposed by the representatives of the people in the legislature, the power, which belongs to them alone under the Constitution, being exercised *pro hac vice* by those to whom they have seen fit to delegate it. The tax being thus imposed by the power and authority of the legislature alone, it follows that it might as well be delegated to local authorities who do not represent the people, as having been elected by them; that it might be delegated to the county court, whose members, under the Constitution of 1776 and 1830, were not elected by the people or responsible to them in any way. Case of Levy, 5 Call, 139; Harrison Co. Justices v. Holland, 3 Grat. 247. So the power might be delegated to the school commissioners of a particular district, who are not the general municipal authorities of the county. Bull *et al.* v. Read, &c. 13 Grat. 78. When the power to impose a tax is thus delegated to local authorities, they do not exercise their power under the authority which belongs to them as local officers. They exercise only the special authority delegated to them by the legislature in the particular case and for the particular purpose. On principle, I can imagine no reason why the power might not as well be delegated to any other person, in the discretion of the legislature. The members of the legislature are the representatives of the people referred to in the Bill of Rights, section 6. Otherwise the cases cited from 5 Call and 3 Grat. were not well decided. Such, too, is the plain meaning of the language. And it seems plain from the language that this provision of the Bill of Rights was not intended as a restraint upon the legislature in exercising the power of taxation, but was only intended to affirm, in general terms, a fundamental principle of free government."

§ 1558. The foregoing decisions rest upon the power of the legislature to distribute the burdens of taxation amongst those to be, in its judgment, benefited by it. But it may be urged with great force, that while the legislature may exercise this power in apportioning taxes, to be collected and paid as taxes, it cannot go further and authorize the officers or agents of a municipal corporation to bind it by negotiable bonds or other contracts without a popular vote. The legislature is the representative body of the State. It may contract for the State in its sovereign character. But it does not follow that it may contract for a lesser portion of the people than the whole community, or confer that power upon others without the consent of a majority of the people of the lesser community. And if the question as to legislative power were opened *de novo*, this is the view which it would seem to us should be adopted by the courts; as it is that which we humbly think sound judgment and safe policy enjoins. If the legislature may authorize a commissioner or other person selected by it, to bind a community included in a mile square, or other geographical space, it follows that it might only include the estate of a single individual as the subject of the burden, and fix upon the owner alone a contracted liability which he himself has no power to limit or prevent. And such an act, which may amount to actual confiscation, does not seem to us to come within the sphere of legislation at all. Still, it is replied that the legislature is the representative of the people as a whole, and in all their constituent parts; that the evil inherent in the injudicious exercise of the legislative power is no argument against the existence of the power; and the decided cases do not as a general rule observe or apply the distinction between the power to levy a tax, and the power to create a liability by contract, which is above made.[1]

§ 1559. It will not be presumed that a legislature con-

[1] See opinion of Joynes, J., in Larghorne v. Scott, 20 Grat. 661. See also Opinion of Kingman, C. J., in Commissioners of Shawnee County v. Carter, 2 Kans. 134, quoted *infra*, § 1563, note 4.

ferring authority on a municipal corporation to subscribe to a public work, intended it to be exercised without a precedent popular vote, where it does not plainly appear; and if the statute authorizing the subscription provide that the county court "may," for information, cause an election to be held to ascertain the sense of the taxpayers on the subject, "may" will be construed as "shall," in so far as to require a vote to be taken as a condition precedent to the validity of the subscription, and bonds issued in pursuance of it.[1]

§ 1560. *In the third place: may the legislature validate municipal securities invalid when issued?*—Many interesting cases have arisen involving the power of legislative bodies to pass curative acts confirming and declaring valid the securities of municipal corporations which were, when issued, not binding upon them, because of defect of authority, or irregularity in the steps taken. There is no doubt, we think, and it has been decided in a number of cases, that where there has been a popular vote in favor of subscriptions to public purposes, and bonds have been issued in order to effectuate the popular will, but were wanting in validity, because of non-compliance with statutory law, or defect of authority in the corporation to make the subscription, the legislature may ratify and confirm them. Its sanction to the subscription, or to the form of proceeding, being the only element lacking to its validity, it may be supplied retrospectively, and having all the effect of a ratification, it operates the same as a previous authority.[2]

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[1] Leavenworth, &c. R. R. Co. v. County Court, 42 Miss. 175; Steines v. Franklin County, 48 Id. 169. See also St. Louis v. Alexander, 23 Miss. 483.

[2] Knapp v. Grant, 27 Wisc. 151; Bass v. Columbus, 30 Ga. 848; McMillen v. County Judge, 6 Iowa, 393; but see State of Iowa v. County of Wapello, 13 Iowa, 388; Steines v. Franklin County, 48 Miss. 187, 188; Barton County v. Walker, 47 Id. 202; Hannibal, &c. R. R. Co. v. Marion Co 36 Id. 294; Campbell v. Kenosha, 5 Wall. 194; City v. Lamson, 9 Id. 477; Thomson v. Lee County, 3 Id. 331; Gelpcke v. Dubuque, 1 Id. 229; St. Joseph Township v. Rogers, 16 Id. 663. See also Schenley v. Commonwealth, 36 Penn. St. 29; Cooley on Const. Limitations, 370, 381. In Beloit v. Morgan, 7 Wall. 619, it appeared that the legislature of Wisconsin created the city of Beloit, carving it out of territory formerly constituting the town of Beloit, and in the city char-

§ 1561. In conformity with this doctrine it has been held in Wisconsin, that where a city bond was executed without legislative authority, merely because the act authorizing its issue had not been published at the time so as to take effect, but there had been a popular vote in favor of the issue of the bond, the legislature might, with consent of the city authorities, ratify the issue, and give validity to the bond.[1] On the same principle it was held in Illinois, that where a school tax had been voted by the people of a school district, but it was invalid under the law, because it was not certified to the county clerk on the day designated by law, the legislature had power to pass an act remedying the defect and validating the tax, while it yet remained uncollected.[2] So it has been held by the United States Supreme Court, that a legislature may pass a curative act validating bonds issued by a municipal corporation, where the defect consisted in the fact that the submission of the question as to whether or not they should be issued, was under the wrong act;[3] and where the vote was taken upon the wrong day, and there were informalities in respect to keeping the records and filing the certificates of election;[4] and where there were other circumstances of irregularity.[5]

§ 1562. It has also been held that the legislature may validate securities issued without a popular vote. Thus, where the council of municipality No. 1, issued bonds to a theater company, as a subscription thereto, without legislative authority, and without a popular vote, an act validating

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ter provided that: "All principal and interest upon all bonds which have heretofore been issued by the town of Beloit for railroad stock and other purposes, when the same or any part thereof shall fall due, shall be paid by the city and town of Beloit, in the same proportion as if said town and city were not dissolved." This provision was held by the court to invalidate all bonds which had been irregularly issued by the town of Beloit, and to cure all such irregularities.

[1] Knapp v. Grant, 27 Wisc. 147.

[2] Cowgill v. Long, 15 Ill. 203.

[3] Campbell v. City of Kenosha, 5 Wall 194. The court said: "This is not in terms a curative act, but it has that effect by fair implication."

[4] St. Joseph Township v. Rogers, 16 Wall. 663.

[5] Thomson v. Lee County, 3 Wall. 327.

them was sustained.[1] The United States Supreme Court has said, Fields, J., giving its unanimous opinion: "A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just on itself, being founded upon a valuable consideration recovered by the corporation is not a retroactive law—no more so than an appropriation act providing for the payment of a preceding claim;" and such an Act of the Legislature of Louisiana, imposing upon a city the payment of such a claim, evidenced by coupon bonds, was sustained.[2]

§ 1563. On the contrary, it has been held that an Act of the Legislature which declared valid and binding bonds which had been issued by county officers on account of the county court house, and which bonds were not enforceable against the county because differing in form and substance from the warrants authorized by pre-existing statute, was in excess of legislative authority and void, it being thought that it was a judicial rather than a legislative act.[3] "Courts," said King-

[1] First Municipality v. Orleans Theater Company, 2 Rob. (La.) 209.

[2] New Orleans v. Clark, 95 U. S. 5 Otto, 645.

[3] Commissioners of Shawnee County v. Carter, 2 Kans. 134, 135; Kingman, J.: "The act differs from those retrospective laws, which are frequently passed, supplying defects and curing informalities in the proceedings of officers and tribunals acting within the scope of their authority. The county commissioners were not acting within the scope of their authority in issuing these bonds. They did not conform to the law only in an irregular way, but they broke down the barriers which the law had raised in a very regular way, and their acts in the premises were void, not for want of any formality or regularity or mistake as to time or otherwise, but for want of power under the law." "The defendant had his rights. The law pointed them out. He was entitled (if to anything) to his warrants, and must bide his time for their payment under the limited power of taxation conferred on the board. He preferred bonds with a higher rate of interest, trusting to the healing power of subsequent legislation. He had as much right and power to bind the county in the execution of these bonds as the board had. If he had made these bonds, the legislature would have had as much power to make them valid by an act declaring them binding upon the county as it had in the present case. Let such a power be once recognized, and within what bounds will the exercise of it be limited? The legislature undertook to make a law for this case, affecting and changing rights and imposing burdens contrary to previously established law, so that the act, if valid, has all the force of a judgment, though in violation of the principles upon which judgments are

man, J., "are estopped from an inquiry into the facts by the act itself." So it has been held in Wisconsin, that the legislature had no right to declare valid a contract of the common council of Milwaukee, made in excess of authority, without assent of the city,[1] though, as explained in a subsequent case, the legislature may cause a retrospective tax to be levied on a municipal corporation for a public purpose.[2] These cases seem to us to strike the true line of demarcation of legislative power.

§ 1564. *In the fourth place: may the legislature authorize municipal officers to ratify invalid securities without a popular vote?*—Where there has been a popular vote in favor of a subscription to a public work, and the securities have been issued by an unauthorized officer or agent, the legislature has power to confer upon the officer or agent who was empowered to issue them, the power to ratify them, and thus effectuate the popular will.[3] So it has been held that the

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rendered. If the act is a law, there is no evading it, even could it be proven that none of the work had been done, or that it had been previously paid for, or that the contract had been procured by fraudulent collusion between the officers making it and the contractor. Courts are estopped from an inquiry into the facts by the act itself, if it have any force in this case. We cite these results from the act, not as having any existence in this case, but to show the consequences which would result from upholding the power of a legislature to exercise such authority." See Mosher v. Ind. School Dist. 44 Iowa, 122.

[1] Hasbrouck v. Milwaukee, 13 Wisc. 38.

[2] Mills v. Charleston, 29 Wisc. 37; see also Ginn v. Weissenberg, 57 Penn. St. 433; Musselman v. Logansport, 29 Ind. 533.

[3] Hannibal, &c. R. R. Co. v. Marion Co. 36 Mo. 294; Barton Co. v. Walker, 47 Mo. 202; Steines v. Franklin County, 48 Id. 187, 188. In Hannibal, &c. R. R. Co. v. Marion County, 36 Mo. 294, it appeared that doubts existed as to the validity of certain county securities, because, as alleged, they were issued by an agent of the county court instead of by the county court itself, as the statute required; and the legislature passed a curative act. Wagner, J., said: "But if any doubts were entertained of their validity, by the sixth section of the amended charter it is enacted that 'subscription shall be held valid and binding upon such counties,' &c., 'if approved of hereafter by the said county court.' Now, as we have heretofore seen, the county court did, after the passage of this act, approve of the subscription, and ratify it so far as they had power by virtue of and in accordance with said act.

"But it is contended that the act is afflicted with a constitutional infirmity, and that it is necessarily inoperative as a confirmatory act, because, if the pro-

legislature may authorize a city council to ratify securities which it was empowered to issue upon the petition of three-fourths of the legal voters.[1]

In all these cases mere irregularities were corrected by the curative acts. It is obvious that the question whether or not the legislature may go beyond this, and empower officers to ratify instruments utterly lacking in elements of

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ceedings of the court and its agents were void previous to the passage of the act, by want of authority, they could not be rendered effectual for any purpose by means of legislation. Although individuals may not have the power to make good *ab initio* that which was originally void by subsequent deed or acts of confirmation, yet that principle has but a slight, if any, application to the case. The act of the legislature does not purport to confirm, ratify, and make unqualifiedly valid the proceedings of the county court by its own terms; it does not act *ex proprio vigore*, but delegates authority to those who had prior to that time subscribed for stock to approve of and confirm the same. It left the matter entirely optional with the county court, as the representative and agent of the county, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription, and by that act they gave just the same effect to the contract to subscribe the stock, and to all the proceedings had by the county court in reference to it, as if they had had full authority in the first instance. Nor has the county any just cause of complaint from this conclusion, as it is obvious that the contract was entered into in good faith, and with the firm belief that ample power for the act existed; and the only effect of the legislative act, and the approval by the court, was to execute and fully carry out precisely what was intended, but which they found was not accomplished by a defect in their authority. The notes were made by the justices in a public capacity and in the line of their official duty; the contract inured to the benefit of the county, and the county was bound by the obligation thereby created. Hodgson v. Dexter, 1 Cranch, 345; Tutt v. Hobbs, 17 Mo. 486.

"Upon a full view of the case, it appears that both parties acted with honesty and good faith; the county made the subscription to plaintiff's railroad, and received certificates of stock for said subscription, like all other shareholders; that for nine years it had been regularly represented at the meetings of the stockholders and of the board of directors, and that during that period of time the interest accruing on the stock notes has been regularly and punctually paid. It appears also that many of these stock notes, or obligations, have passed into the hands of *bona fide* indorsers and innocent purchasers; their rights ought not to be impaired without good and substantial reasons."

[1] Bissel v. Jeffersonville, 24 How. 295. Clifford, J.: "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority."

validity, is the same as that heretofore discussed, to wit, whether it might authorize such officers to issue such instruments without a popular vote. For, of course, the legislature could only confer retrospective power upon those who could receive a prospective power.[1]

§ 1565. *In the fifth place: may the legislature abolish the right of the municipality to plead the defense of illegality to its contract?*—This is another form in which the question of the right of the legislature to validate invalid securities arises, and it may be regarded as a settled principle of the jurisprudence of the United States that the legislature possesses this power. Thus suppose a municipal corporation issues a negotiable bond, and disposes of it in a usurious transaction, which renders it void *ab initio*, and in all hands, and that the legislature afterward repeals the right of the corporation to plead usury as a defense. In such a case the corporation has given its consent, and declared its intent and will, to be bound by the bond. The body of the contract has been created by its own act, and it lacks life only by reason of the legislative prohibition and refusal to recognize it; and when the legislature subsequently abolishes the right to plead usury, it simply withdraws the impediment of its prohibition, concurs in the pre-existing assent of the corporation to the contract, recognizes its act, and breathes life into it. These views have been held to apply to municipal contracts,[2] as well as to those of private corporations and individuals,[3] there being, as is conceived, no distinction as to the character of the parties to whom they are applicable. There can be no valid objection to the doctrine on the

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[1] See *ante*, §§ 1557, 1558 *et seq.*

[2] Town of Danville v. Pace, 25 Grat. 1; Cooley on Constitutional Limitations, 378.

[3] Lewis v. McElvain, 16 Ohio, 347; Trustees v. McCaughy, 2 Ohio N. S. 155; Johnson v. Bentley, 16 Ohio, 97; Syracuse Bank v. Davis, 16 Barb. 188; Curtis v. Leavitt, 17 Barb. 309; 15 N. Y. 9; Parmelee v. Lawrence, 48 Ill. 331; Goshen v. Stonington, 4 Conn. 209; Woodruff v. Scruggs, 27 Ark. 26; Andrews v. Russell, 7 Black, 474; Bangher v. Nelson, 9 Gill, 299.

ground that it impairs vested rights, for a party "has no vested right to do wrong." [1]

Nor can it be objected that it impairs the obligation of a contract, for it is in furtherance of the enforcement of contracts, and of equity and good morals.[2]

[1] Satterlee v. Mathewson, 16 Sergt. & R. 191, Duncan, J.; Town of Danville v. Pace, 25 Grat. 15, Staples, J.; Foster v. Essex Bank, 16 Mass. 215, Parker, C. J.; Cooley on Constitutional Limitations, 378.

[2] Lewis v. McElvain, 16 Ohio, 347; Cooley on Const. Lim. 374.

CHAPTER XLIX.

CHECKS.

SECTION I.

WHAT IS A CHECK?

§ 1566. A check is (1) a draft or order (2) upon a bank or banking house, (3) purporting to be drawn upon a deposit of funds (4) for the payment at all events of a certain sum of money, (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand. This definition has been approvingly quoted.[1]

Any instrument fulfilling the above description may, we think, be safely denominated a bank check, and the definition given is sustained by many authorities, though not in the language of the text. Writers upon negotiable instruments have differed in their definitions of this species of commercial paper, some falling short of giving all its distinguishing qualities, and some ascribing to it qualities which it is not absolutely necessary that it should possess. And there is none which can be safely relied on as a guide in answering the question: Is this paper a check?[2]

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[1] Blair & Hoge v. Wilson, 28 Grat. 170 (1877), Burks, J.

[2] We cite the definitions and descriptions of checks which the text writers give. Their insufficiency will be readily observed by the attentive professional reader:

"A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money," says Parsons, vol. 2, N. & B. 57.

"A check drawn on a bank is a bill of exchange payable on demand." Edwards on Bills, 396.

"A check on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand." Byles on Bills (Sharswood's ed.) [*13], 84.

"A check is a written order or request addressed to a bank, or to persons

§ 1567. *In the first place, a check is a draft or order.*— A bill is also a draft or order; and it is often said that a check is, in legal effect, a bill of exchange drawn on a bank or banking house, with some peculiarities.[1] In some cases it is called a bill payable on demand,[2] and in others an inland bill, or in the nature of an inland bill, payable on demand;[3] and the expression that a check is "like a bill" has been criticised on the ground that "*nihil simile est idem*," whereas "checks are bills, or rather bill is the genus, and check is a species."[4] In form a check is a bill on a banking house (payable on demand, as we conceive); and it is perfectly correct to say that it is a bill with some peculiarities, or a species of a bill. Sir G. Jessel, Master of the Rolls, calls it: "a bill of exchange payable at a banker's."[5] But this is not a definition. It comes within the general designation of a bill so far that a statute authorizing the protest of inland bills would include inland checks;[6] but it is erroneous to ascribe to a check a necessary inland character. A draft drawn in one State, on a bank in another, is nevertheless a check; and, in point of fact, checks are very much used in

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carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." Story on Promissory Notes, § 487.

Chitty's definition is substantially the same as Story's. Chitty on Bills (13th Am. ed.) [*511], 578.

[1] Billgerry v. Branch, 19 Grat. 418; Matter of Brown, 2 Story, 502; Cruger v. Armstrong, 3 Johns. Cas. 5; Bœhm v. Sterling, 7 T. R. 423; Keene v. Beard, 8 C. B. N. S. 372 (98 E. C. L. R.); Blair & Hoge v. Wilson, 28 Grat. 170 (1877). "It is sometimes inaccurately described," says Burks, J., as "a bill of exchange payable on demand," or "as in legal effect an inland bill of exchange drawn on a banker payable to bearer on demand. While it has many of the properties of bills, it has several peculiar characteristics."

[2] Harker v. Anderson, 21 Wend. 372; Edwards on Bills, 396.

[3] Byles on Bills (Sharswood's ed.) [*13], 84; Keene v. Beard, 8 Com. B. N. S. 373; Merchants' Bank v. Spicer, 6 Wend. 445; Cruger v. Armstrong, 3 Johns. Cas. 8; Purcell v. Allemong, 22 Grat. 742, Anderson, J.

[4] Matter of Brown, 2 Story, 502.

[5] Hopkinson v. Forster, 18 Eq. Cas. L. R. 74 (1874).

[6] Moses v. Franklin Bank, 34 Md. 574.

the United States in transmitting money from one State to another.[1]

§ 1568. *Secondly, it is absolutely necessary that the draft, in order to be a check, should be drawn upon a bank or banker.*—Upon this point the authorities are agreed.[2] A bill may also be drawn upon a banker;[3] and, therefore, while it is necessary that a check should be so drawn, that alone does not distinguish it. It does not seem necessary that the drawee, when an individual, should be described as a banker; and an order addressed simply to "Messrs. A. & B.," has been held a check, it being proved that they were bankers.[4] Between the original parties, the payee knowing them to be bankers, such an order might be regarded as a check with reason, although we think it would be better to require that the instrument should not be so considered, unless its face showed that it was drawn on a banking house. But when transferred to a *bona fide* holder without notice, it is clear that it should be regarded as a bill, if it would operate any advantage to him to do so.

[1] Planters' Bank v. Kesee, 7 Heisk. 200 (1871); Herring v. Kesee, Southern Law Rev. Oct. 1872, 613; Roberts v. Austin, 26 Iowa, 315; 2 Parsons N. & B. 59.

[2] See Definitions, *ante*, § 1566, note; Espy v. Bank of Cincinnati, 18 Wall. 620; Bowen v. Newell, 8 N. Y. 195. In Morrison v. Bailey, 5 Ohio St. 13, this point seems to have escaped notice.

[3] Georgia National Bank v. Henderson, 46 Ga. 495 (1872), Warner, C. J., saying: "A chartered bank is an artificial person, and a bill of exchange may as well be drawn upon and made payable to an artificial person as to a natural person; the three days of grace are allowed as well on bills drawn upon and payable to artificial persons as to natural persons. There is no distinction as to the time when a bill of exchange becomes due between one drawn upon and payable at a bank, and one payable to a natural person; both become due on the last day of grace, unless, under our code, the bill is payable at a bank on sight or on demand. Why should there ever have been any difference as to the allowance of days of grace between a bill drawn upon and payable to a chartered bank and one drawn upon and payable to a natural person? The truth is, the same principles of commercial law apply to both, so far as the allowance of days of grace are concerned; and did, when this bill of exchange was placed in the defendant's hands for collection, except checks drawn on a bank payable at sight or on demand." See cases cited in notes.

[4] Planters' Bank v. Kesee, 7 Heisk. 200 (1871); Herring v. Kesee, Southern Law Review, Oct. 1872, p. 613.

§ 1569. *Thirdly: A check purports to be drawn upon a deposit.*—It is frequently said that a check is drawn upon a deposit in the banker's hands;[1] and the fact that it is so drawn has been held necessary to constitute the draft a check.[2] But this cannot be the true criterion. It is not the fact that the order is actually drawn on a deposit, but the fact that it purports to be so drawn, which constitutes it a check; and it is more accurate to say that it is upon its face a draft upon a deposit.[3] To hold otherwise would authorize the construction of a written contract by the light of an extraneous fact of which the holder had no notice. If there were no deposit, it would be a fraudulent check—but a check, nevertheless—and we cannot conceive of a wider departure from principle than to hold that the fraud varied the nature of the instrument itself.

§ 1570. *Fourthly: A check must be for the payment at all events of a certain sum of money.*—In this respect it does not differ from other negotiable instruments; and though, perhaps, it might still be termed a check although not payable in money, by which is meant the legal tender currency of the country, it would certainly not be negotiable if expressed to be payable "in bank bills" or "in currency,"[4] or if it lacked words of negotiability,[5] or were deficient in any of the characteristics in respect to certainty in fact and time of payment and party to whom payment is to be made.

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[1] Morrison v. Bailey, 5 Ohio St. 13, where it is said: "A check is drawn on an existing fund." Espy v. Bank of Cincinnati, 18 Wall. 620, Miller, J.: "A check is drawn against funds on deposit with the banker."

[2] Planter's Bank v. Kesee, 7 Heisk. 200. Nicholson, J., said: "As it is drawn upon a deposit in bank, it falls directly within that class of bills of exchange known in the commercial world as checks." In Herring v. Kesee, McFarland, J., referring to Brown v. Lusk, 4 Yerg. 210, said in that case "the drawer had no funds in the bank upon which to draw, and this was probably the distinguishing feature." See Southern Law Review, October, 1872, article on Checks.

[3] See Champion v. Gordon, 70 Penn. St. 476.

[4] Bank of Mobile v. Brunn, 42 Ala. 108; Little v. Phœnix Bank, 2 Hill (N. Y.) 425.

[5] Partridge v. Bank of England, 9 Q. B. 396.

§ 1571. *Fifthly: A check may be made payable to a certain person therein named, or to him or his order, or to him or bearer, or simply to bearer*, in like manner as a bill of exchange, and may be transferred by indorsement or assignment, as the case may be, in like manner and to the like effect as a bill of exchange.[1] There is no common law obligation, however, according to the English authorities, upon a bank to pay checks other than those payable to bearer, it being considered that the bank has a right to require that it should not run the risk of mistaking the signature of the party to whose order it is payable, and thus becoming responsible in the event of its turning out to be a forgery;[2] and this has led some text writers and judges to declare that a check must be payable to bearer.[3] It is certainly not deemed requisite to its character and validity as a check that it should be so payable. And now the custom of banks to pay checks drawn payable to order is so universally and notoriously recognized and followed, that it would doubtless be regarded as binding on the bank in all cases where nothing is said on the subject.[4] Checks are sometimes drawn payable "to the order of bills payable," or to the order of a certain number, or by some such phrase to express that negotiability which only exists in connection with the word "order." But as such a check cannot be indorsed by any party to it in the usual way, it has been held to be payable to bearer, and transferable by delivery.[5] The bank, it is conceived, would be entitled to a reasonable time to ascertain the genuineness of the indorser's signature before paying a check drawn payable to order.[6]

[1] Billgery v. Branch, 19 Grat. 418; Matter of Brown, 2 Story, 502; Cruger v. Armstrong, 3 Johns. Cas. 5; Elting v. Brinkerhoff, 2 Hall, 459; Munn v. Burch, 25 Ill. 35; Story on Notes, § 488. In First National Bank v. Harris, 108 Mass. 514, it is held that a national bank has authority to buy checks on other banks, whether they be payable to bearer or order.

[2] Bellamy v. Majoribanks, 8 E. L. & Eq. 519.

[3] Byles on Bills (Sharswood's ed.) [*13], 84; Chitty (13th Am. ed.) [*511], 578; Woodruff v. Merchants' Bank, 25 Wend. 672.

[4] Morse on Banking, 306.

[5] Willets v. Phœnix Bank, 2 Duer, 121; Mechanics' Bank v. Stratton, 2 Keyes, 365; Minet v. Gilson, 3 T. R. 481; 1 H. Bl. 569.

[6] Robarts v. Tucker, 4 E. L. & Eq. 236.

In England, an instrument in form a check, but payable to order, was for a long time by statute made an inland bill, and required to be stamped as such, parliament requiring that all checks should be made payable to "bearer" or to "A. or bearer." But by more recent enactment, checks payable to order have been legalized as checks; but the same enactment has provided that the bank making payment on such a check should not be liable if the original or any subsequent indorsement were forged.[1] This renders the business of banking much less hazardous.

§ 1572. *Sixthly, a check is payable instantly on demand.* —This is, as we conceive, the touchstone by which a check is tested. Usually, no time of payment is expressed upon its face, but all commercial instruments in which no time of payment is expressed are understood to be, and impliedly are, payable on demand; and when so payable by implication, or in express terms, they are payable instantly, without the allowance of grace, which pertains to those payable on a particular day.[2] The whole theory and use of a check points to its immediate payability as its distinguishing feature, and its name imports it. A person deposits money with his bank or

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[1] 16 & 17 Vict. ch. 59, § 19; 2 Parsons N. & B. 596: Morse on Banking, 306.

[2] See Days of Grace, Chapter XX, vol. 1, § 617; Morse on Banking, 242. In the case of the Merchants' Bank v. State Bank, 10 Wall. 647, the Supreme Court of the United States says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of law merchant are alike applicable to both.

"Each is for a specific sum, payable in money. In both cases there is a drawer, drawee, and payee. Without acceptance no action can be maintained by the holder upon either, against the drawee.

"The chief points of difference are that (1) a check is always drawn on a bank or banker. (2) No days of grace are allowed. (3) The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. (4) It is not due until payment is demanded, and the statute of limitations runs only from that time. (5) It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. (6) It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud." See Blair & Hoge v. Wilson, 28 Grat. 170.

banker where it is subject at any time to his order. By an order he appropriates so much of it to another person, and the bank or banker, in consideration of its temporary use of the money, agrees to pay it in whole, or in parcels, to the depositor's order when demanded. But he does not agree to contract to pay at a future day by acceptance, and the depositor cannot require it.

§ 1573. If a draft upon a bank or banker be dated on a certain day, say the first of December, and be payable on a future day named, say the tenth of December, it has been considered by some authorities to be a check payable on the precise day named without grace; and the high authority of Story and Sharswood sustains this view.[1] Such an instru-

[1] Matter of Brown, 2 Story, 502. The draft was as follows:

"Granite Bank, $703 50. "Boston, April 18th, 1841.

"Pay to Curtis & Co., 18th May, or bearer, seven hundred three dollars and fifty cents.

"To cashier. EPHRAIM BROWN."

In Champion v. Gordon, 70 Penn. St. 474 (1872), the draft was as follows:

"Philadelphia, November 22d, 1869.

"The Commonwealth National Bank pay to H. Yerkes or order one hundred and fifty (December 3d, 1869) dollars.

"JOHN B. CHAMPION."

Champion v. Gordon, 70 Penn. St. 475 (1872), Sharswood, J., saying: "The ordinary commercial form of a bill of exchange payable at a future day is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill, with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer, by adopting this usual form, must be held so to intend. So if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person. If such an order, drawn upon a bank payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, protest it at once for non-acceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the meantime he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication

ment payable at so many days after sight,[1] and at so many days after date,[2] has also been deemed a check payable at the expiration of the number of days named, without grace. There is more reason for considering a draft payable on a precise day named a check than for so considering it when payable at a certain time after sight, or after date. For it is not usual to frame bills of exchange payable on a precise day, while "after date" and "after sight" are phrases of constant use in drawing them.

Nor can we perceive any commercial utility in regarding it as a check. If the drawer wishes to give the draft payable in future the characteristics of a check, he can do so by post-dating it; and then it could not be presented for acceptance, because it would not be operative until the day of its post-date arrived.[3] Or, if he desired it to have the effect of a bill, and yet not have grace, he could express "without grace" on its face;[4] and if he did not wish to have it presented for acceptance, he could express it in like manner "without acceptance."[5] Thus the various uses and objects of the different in-

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payable on a future day. Why, then, is a check expressly so made payable to stand on different ground? In the case before us, an ordinary printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying teller to the fact, which he would be likely to overlook if it were expressed only by the date. Nothing, I am told, is more common than such mistakes in the payment of post-dated checks, and depositors often thus find their accounts overdrawn, very much to their embarrassment. If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check, and not a bill of exchange."

In Bowen v. Newell, 5 Sand. 326, the court held that an order on a bank payable at a future day was a check, and not entitled to grace. This decision was followed in the same case reported in 5 Duer, 584. But in 4 Seld. 190, the contrary view was taken. And finally, in 3 Kern. 290 (the case having been four times litigated), the court came to the conclusion that by the principles of the law merchant the instrument was entitled to grace, but permitted local usage to control to the contrary.

[1] Herring v. Kesee, Southern Law Review, October, 1872, article on Checks. The order was upon a firm not described as bankers, and payable ten days after sight. It was accepted by the drawees and held a check.

[2] Westminster Bank, 4 R. I. 30. Instrument payable "ninety days after date" was deemed a check.

[3] See *post*, § 1578, and Section IV. [4] See Chapter XX. § 633, vol. 1.

[5] See Chapter XVII. § 454 and Chapter XVIII. § 481, vol. 1.

struments could be subserved; but otherwise they become confused and difficult to attain.

§ 1574. But every draft or order upon a bank or banker which is not payable immediately, possesses, as we think, all the qualities of a bill of exchange; and the preponderance of authority sustains this view, whether the instrument be payable on a precise day named or at so many days after date or sight.

In Missouri, the paper in question was dated 12th October, 1860, was addressed to "The Southern Bank of St. Louis," and ran: "Pay to M. C. Jackson & Co., or order, five hundred dollars, on 22d October." The bank receiving the draft for collection presented it on October 22d, and payment being refused, it was held liable for negligence for not presenting it on the 25th, allowing grace. The court said: "This bill is neither payable at sight nor on demand, but on a day certain; and it was therefore entitled to grace, and it was negligence to present it before grace had expired."[1]

So in Georgia the following instrument was held to be a bill of exchange entitled to grace, and not a check: "Atlanta Georgia, August 4th, 1866. Georgia National Bank of Atlanta, Georgia. Ninety days after date, pay to F. R. Bell, or order, one thousand dollars. (Signed) Massey & Herty."[2] And the like view has been taken in Ohio,[3] California,[4] and other States.

§ 1575. It follows, as matter of course, from what has

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[1] Ivory v. Bank of the State, 36 Mo. 475.

[2] Henderson v. Pope, 39 Ga. 361, r-affirmed in Georgia National Bank v. Henderson, 46 Ga. 496 (1872).

[3] In Morrison v. Bailey, 5 Ohio St. 13, the instrument was dated June 30th, and was payable "on the 13th July." It was held not a check, but a bill entitled to grace. In a later case the question was held to turn on the intention of the parties. Andrew v. Blackley, 11 Ohio St. 89.

[4] In Minturn v. Fisher, 4 Cal. 36 (1854), the instrument was dated "San Francisco, June 9th, 1853," and was addressed to P. B. & Co., bankers, requesting them to pay $3,890 18 "on the fifteenth (15th) inst." It was held a bill, and not a check, and entitled to grace, and demand on the 15th was premature. Work v. Tatman, 2 Houst. (Del.) 304; Bradley v. Harrington, 5 Harring. 305; 2 Parsons N. & B. 68, 69.

been already said, that a check is not entitled to grace. The very idea of the instrument is its immediate payability. And the question which is often discussed, whether or not a check drawn payable at a future day is entitled to grace, in itself confounds the distinction between a check and a bill. For if payable at a future day, it is not a check, but a bill, and as such entitled to grace, like any other bill payable in the future.[1]

§ 1576. Whether or not the usage of banks in any particular place, and of business men to regard drafts on banks payable at a future day after date as checks, and not entitled to grace, is admissible in evidence to control the general law merchant, is a question upon which the authorities are divided. Some cases hold such evidence inadmissible;[2] but others take the ground that the common understanding of the business community ought to be carried out, and admit such evidence to effectuate it.[3]

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[1] In Morse on Banking, p. 243, it is said: "Often an instrument, in its form substantially like a check, is made payable at a day subsequent to that both of its date and of its issue, either by naming such a date in the body of the instrument, or by making it payable so many days after date. In such cases it is often a question whether or not grace is to be allowed. But though this is the question, it does not take the form of whether or not grace is to be allowed on such a check, but whether or not such an instrument is a check at all. For if it is a check, that simple fact is conclusive of the fact that it is payable immediately on demand on the day named, without grace. A check is and must always be so payable. But if it be not a check, then it will probably have the customary grace of the place where it is made payable, and will be called a bill of exchange." See 2 Parsons N. & B. 68, 69.

[2] Morrison v. Bailey, 5 Ohio St. 13; Minturn v. Fisher, 4 Cal. 35.

[3] Bowen v. Newell, 3 Kern. 290; Champion v. Gordon, 70 Penn. St. 476 (1872); Morse on Banking, 247.

SECTION II.

FORMAL PARTS AND VARIETIES OF CHECKS.—BUSINESS AND MEMORANDUM CHECKS.

§ 1577. *As to the date: A check should be dated.*—It may bear its actual date, or be ante-dated or post-dated. "But it would seem," says Morse in his excellent treatise, "that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable."[1] There is no adjudication to this effect. And while it may be that a bank would be warranted in refusing to pay an undated check (and this is doubtful), it would not be unreasonable for it to assume a cotemporaneous date, and to pay it accordingly.

§ 1578. It makes no difference (independent of any statutory regulation) whether a check be post-dated or ante-dated, and it is still payable according to its express terms. The drawing of post-dated checks is an every-day occurrence in the commercial cities; and the uniform understanding of parties is, that when the check is post-dated —say as of the 14th of January, when actually drawn on the 1st—that it is payable on the day it purports to be, without any days of grace, even though it be negotiated beforehand.[2]

If the check be post-dated so that it falls due on Sunday, that is, bears date as of a coming Sunday, payment cannot be demanded until the Monday afterward; and if the bank pay it before that Monday it acts as its peril.[3]

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[1] Morse on Banking, 238.

[2] Taylor v. Sip, 1 Vroom, 284; Mohawk Bank v. Broderick, 10 Wend. 304; s. c. 13 Wend. 133; Matter of Brown, 2 Story, 502; Salter v. Burt, 20 Wend. 205. Independent of the stamp act, the rule is likewise in England. Story on Prom. Notes, 490; Whister v. Foster, 32 L. J. C. P. 161; 14 C. B. N. S. 238 (108 E. C. L. R.); Austin v. Bunyard, 34 L. J. 217; Allen v. Keeves, 1 East, 435.

In England, the stamp act has led to much controversy as to post-dated checks, which it is unnecessary to discuss here. See 2 Parsons N. & B. 69, 71; Byles on Bills [*15], 87, *et seq.* and numerous cases referred to.

[3] Salter v. Burt, 20 Wend. 205.

§ 1579. *As to the language.*—There must, of course, be words expressing an order that the bank shall pay the amount. They need be in no particular form. And sometimes they are accompanied with the words "for value received," or a statement of the consideration. This slight addition is immaterial.[1]

§ 1580. *As to the sum.*—The sum should be distinctly and carefully expressed in figures and in words to avoid any question. But either words or figures are sufficient. The amount should be named in the currency of the country (in the United States simply in dollars); and the bank might properly refuse payment of a check expressed in sovereigns, francs, or any other foreign currency.[2] In the United States, the mark "$" is alone sufficient to express "dollars,"[3] as in England "£ s. d." expresses pounds, shillings and pence.[4] And it has been held that the figures "37.89," divided by a period as indicated, and without even the dollar mark "$," were sufficient to raise the inference that dollars was intended.[5]

Where the marginal figures differ from the written words, the words should be attended to and not the figures. And a change of the figures, so as to conform them to the words, made by the holder, without the knowledge or consent of the drawer, has been held not a material alteration or forgery, as the figures served only as an index, for convenience of reference, and constituted no part of the bill.[6]

§ 1581. *As to the address.*—The name of the bank on which the check is drawn is usually printed in large characters at the top of the check, and frequently in the lower left hand corner are the words "To the cashier," or "To

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[1] Wells v. Brigham, 6 Cush. 6.

[2] Rastell v. Draper, Yelv. 80; Moore, 775; Cro. Jac. 88; Morse on Banking, 236; Grant on Banking, 16.

[3] Corgan v. Frew, 39 Ill. 31. [4] Kearney v. King, 2 Barn. & Ald. 301.

[5] Northrop v. Sanborn, 22 Vt. 433.

[6] Smith v. Smith, 1 R. I. 398; see *ante*, Chapter III, § 86, note 5, vol. 1, and vol. 2, § 1499 *a*.

the cashier of—."[1] It has never been decided, that we are aware of, whether or not these latter words are necessary, And it has been said to be "very doubtful," with the intimation that it is decidedly safer to consider the address "to the cashier" as essential.[2] But very many checks have only the name of the bank upon it. It is the bank to whom it is really addressed, and which is to pay it, and we cannot see that more is needful.

§ 1582. *As to delivery.*—A check, like any other instrument, must be issued before it is binding; and it is considered as issued as soon as it is in the hands of any party who can demand its payment.[3] If it be lost or stolen before being issued, the thief or finder cannot enforce it against the drawer. But, nevertheless, if presented at the bank and payable to bearer, the bank would be protected in paying it. And a *bona fide* holder without notice that it had never been issued, would be protected to the full extent, as would the holder of any other negotiable instrument.

§ 1583. *Memorandum checks.*—There is a class of checks which has recently sprung up in our commercial communities, of a peculiar character, and known as memorandum checks. In their form they do not differ from ordinary checks, and as to third parties who are holders *bona fide*, for a valuable consideration, without notice, they are affected with all the legal rights, and consequences of ordinary checks.[4] "They are in fact, and in law," says Mr. Morse, "equivalent to the drawer's promise to pay for value received. The holder may sue upon them as upon a promissory note, and by reason of their peculiar character, he is not held to present them at the bank for payment, prior to bringing his suit against the maker."[5]

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[1] Matter of Brown, 2 Story, 502; Allen v. Sea Fire, &c. Ins. Co. M. G. & S. 573; Ellison v. Callingridge, Id. 570.

[2] Morse on Banking, 238.

[3] Grant on Banking, 14; Morse on Banking, 239.

[4] Language of Story on Promissory Notes, § 499.

[5] Morse on Banking, 313; Franklin Bank v. Freeman, 16 Pick. 535; Cushing v. Gore, 15 Mass. 69.

§ 1584. The difference in form between the ordinary and the memorandum check is, that the latter usually has the insertion of the word "mem.," which is used to indicate the understanding between the immediate parties.[1] Sometimes the name of the bank is cancelled;[2] but whether the word "mem." constitutes the only mark on its face, or the bank's name be canceled in addition, the effect of the memorandum check is to create an absolute contract of the maker to pay the *bona fide* holder, unconditionally, and not upon the condition of presentment at the bank, non-payment and notice, the formalities being regarded as waived.[3]

In a Massachusetts case, the paper sued on was in form as follows:

"Market *North* Bank, Memo.:

"1000 dolls. — cts. Boston, Aug. 27, 1833.

"Pay to payable, Friday, 30 inst., or bearer, one thousand dollars,

$\frac{}{1000}$.

"To the Cashier. Benj. Freeman."

The word "North" had two lines run through it. The court said: "A memorandum check is a contract, by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."[4]

According to the Massachusetts cases, the erasure of the name of the bank destroys the presumption of consideration which attaches to an ordinary check;[5] but proof of value

[1] Dykers v. Leather Bank, 11 Paige, 612; Franklin Bank v. Freeman, 16 Pick. 535.

[2] Ball v. Allen, 15 Mass. 433; Ellis v. Wheeler, 3 Pick. 18.

[3] Franklin Bank v. Freeman, 16 Pick. 535; Dykers v. Leather Bank, 11 Paige, 612.

[4] Franklin Bank v. Freeman, 16 Pick. 535. The paper being payable at a future day, seems to have been a bill rather than a check. But this point was not adverted to, nor did it seem essential. See *ante*, § 1573, and §§ 161 *et seq.* vol. 1.

[5] Ball v. Allen, 15 Mass. 433.

given, and *bona fides*, authorizes a recovery against the drawer of a regular memorandum check in which the name of the bank is canceled.[1]

A check in the ordinary form cannot be shown by parol evidence to be a memorandum check, and not intended for presentment, and so excusing the holder from presenting before he charged the drawer.[2]

§ 1585. In Morse on Banking, 313, it is said: "The fact that the word 'memorandum' or the abbreviation 'memo.' is written on a check is sufficient in law to render it a memorandum check. But the bank is not bound to pay any attention to these words, or to recognize any contract as implied by them between the maker and payee which gives the check any peculiar character. If such a check is presented for payment, and the drawer has to his credit sufficient funds to meet it, the bank must honor it precisely like any other ordinary check. If the agreement or understanding between the drawer and payee is, that it shall not be presented for payment, any remedy of the drawer for the breach is solely against the payee. If the check is once drawn and delivered, the drawer's reliance that it will not be presented at the bank can rest only upon the good faith of the holder. He cannot drag in the bank as a partner in the arrangement, neither alter the duty of the bank to pay his drafts out of his deposit. This is a rule of law. Usage, or the customary understanding of business men to the contrary, cannot operate to change it."

§ 1585*a*. *Crossed Checks.*—In England there is a well-known usage, which has become the subject of legislation, for the drawer or holder of a check to cross it with the name of a banker, the effect of which was, before the statute which now exists, a direction to the drawee bank to pay the check to no one but a banker; or rather according to the cases, with only a caution or warning to the drawees that care must be used in paying it to any one else. The check re-

[1] Ellis v. Wheeler, 3 Pick. 18.

[2] Kelley v. Brown, 4 Gray, 108.

mained payable to bearer, and its negotiability was not restrained.[1] The statute of 19 and 20 Victoria, c. 25, recites that its object is to provide that drawers or holders of drafts, payable to bearer or order on demand, may be enabled effectually to direct the payment of the same only to or through some banker. It then enacts that the crossing shall have the force of a direction to the bankers upon whom the check is drawn, that it is to be paid to or through some banker, and the same shall be payable only to or through some banker. This statute was held not to restrain the negotiability of the check.[2] Another statute, 21 and 22 Vict. c. 79, enacts this more at large. It says the crossing shall be deemed a material part of the check, and provides against obliteration of the crossing. But this statute has been also held not to restrain the negotiability of the check, and its effect explained by the Court of Appeal.[3] The English usage is not practiced, that we are aware of, in the United States.

SECTION III.

PRESENTMENT AND NOTICE, AND PROTEST OF CHECKS.

§ 1586. It is the general rule, in respect to checks, that the holder has no recourse upon the drawer until it has been

[1] Bellamy v. Majoribanks, 7 Exch. 389; 21 L. J. Ex. 70; Carlon v. Ireland, 5 E. & B. 765; 25 L. J. Q. B. 113; Simmons v. Taylor, 2 C. B. N. S. 528; 4 C. B. N. S. 463; 27 L. J. C. P. 45, 248.

[2] Simmons v. Taylor, *supra*.

[3] Smith v. Union Bank, L. R. 1 Q. R. Div. 31 (1875), affirming same case, L. R. 10 Q. B. 291: "It is asked," said Lord Cairns, delivering the opinion of the Queen's Bench Division of the Court of Appeal, "what is the effect of the statute in enabling the payee to cross a check? We think the answer is easy. It imposes caution, at least, on the bankers. But further, by its express words, it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction. This must often operate for the benefit of the payee or holder who had crossed the check. Further, if, in addition to the check being crossed, the signature of the payee was forged, he would retain his property as pointed out by Mr. Justice Blackburn, and could recover it from the banker notwithstanding 16 and 17 Victoria, c. 59, § 19, which protects a banker paying on a forged indorsement."

presented to the bank, and payment refused; and such presentment and refusal are essential preliminaries to an action against him. And the same rules which are established in relation to the necessity of presentment and notice, in order to charge the drawer and indorsers of bills of exchange in general, apply as well to checks.[1] The fact that the check is presumed to be drawn against deposited funds makes it of even greater importance than in the case of a bill, that a check should be presented, and that the drawer should be notified of non-payment, in order that he may speedily inquire into the causes of refusal, and be placed in a position to secure his funds which were deposited in the bank.[2]

§ 1587. But there is an important distinction as to the extent of the legal consequence of neglect and delay in presentment and notice, between bills and checks. It is true that the indorsers of such instruments stand on the same footing in reference to the effect of delay, or failure in making presentment, or giving notice. They are absolutely and entirely discharged, if presentment be not made within a reasonable time, and due notice given.[3] But the drawer of

[1] Purcell v. Allemong, 22 Grat. 742 (1872); Judd v. Smith, 3 Hun, 190 (10 N. Y. S. C. R.); Conkling v. Gandall, 1 Keyes, 228; Middletown Bank v. Morris, 28 Barb. 616; Cruger v. Armstrong, 3 Johns. Cas. 79; Murray v. Judah, 6 Cow. 484; Harker v. Anderson, 21 Wend. 372; Merchants' Bank v. Spicer, 6 Wend. 445; Franklin v. Vanderpool, 1 Hall, 80; Levy v. Peters, 9 Serg. & R. 125; Conroy v. Warren, 3 Johns. Cas. 259; Edwards v. Moses, 2 Nott & McCord, 433; Sherman v. Comstock, 2 McLean, 10; Daniel v. Kyle, 5 Ga. 245; Humphreys v. Bicknell, 2 Litt. (Ky.) 298; Ford v. McClung, 5 West Va. (Hagans), 156; Edwards on Bills, 396; Clark v. Bank, 2 MacArthur, 249; Pollard v. Bowen, 57 Ind. 234; Farwell v. Curtis, 7 Bissell, 160.

[2] Purcell v. Allemong, 22 Grat. 742; Eichelberger v. Finley, 7 Harr. & John. 381; Merchants' Bank v. State Bank, 10 Wall. 657; True v. Thomas, 16 Me. 36; Hoyt v. Seeley, 18 Conn. 353; Matter of Brown, 2 Story, 502; Moody v. Mark, 43 Miss. 210; Linville v. Welch, 29 Miss. 203; Franklin v. Vanderpool, 1 Hall, 78; Foster v. Paulk, 41 Me. 425; Humphreys v. Bicknell, 2 Litt. 296; Pack v. Thomas, 13 Sm. & M. 11; Case v. Morris, 31 Penn. St. 100; 2 Parsons N. & B. 71.

[3] Merchants' Bank v. Spicer, 6 Wend. 445; Marcy, J.: "As the defendant is sued as an indorser, the plaintiffs must establish a due presentment for payment, and a notice of non-payment to the defendant, before he can be made chargeable for the amount of this check." Little v. Phœnix Bank, 2 Hill (N. Y.), 429;

a bill stands upon a different footing from the drawer of a check. In the case of a bill of exchange, negligence, in respect to presentment or notice, absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made upon a fund deposited to meet it. And negligence of the holder in not making due presentment, or not giving him notice of dishonor, does not absolutely discharge him from liability unless he has suffered some loss or injury from such negligence, and then only to the extent of such loss or injury. He is at most entitled only to such presentment and notice as will save him from loss.[1] Were it otherwise the drawer would profit by a neglect which could do him no injury.[2] If all of the funds be lost by neglect or delay, the holder of the check suffers of course a total loss.[3] It is not sufficient to show a probability of injury,—it must be proved.[4]

Murray v. Judah, 6 Cow. 490; Humphreys v. Bicknell, 2 Litt. 298; Daniel v. Kyle, 1 Kelly (Ga.), 304; Harbeck v. Craft, 4 Duer, 129.

[1] Purcell v. Allemong, 22 Grat. 743; Bell v. Alexander, 21 Grat. 1; Stewart v. Smith, 17 Ohio St. 82; Emery v. Hobson, 63 Me.; Taylor v. Slip, 1 Vroom. (N. J.) 284; Murray v. Judah, 6 Cow. 490; Conroy v. Warren, 3 Johns. Cas. 259; Mohawk Bank v. Broderick, 10 Wend. 309; Little v. Phœnix Bank, 2 Hill, 425; Planters' Bank v. Kesee, 7 Heisk. 200; Park v. Thomas, 13 Sm. & M. 11; Daniel v. Kyle, 1 Kelly, 304; Stewart v. Smith, 17 Ohio St. 82; Morrison v. Bailey, 5 Ohio St. 13. In Lovett v. Cromwell, 6 Wend. 369, it was held that where an injunction from chancery, under the act to prevent fraudulent bankruptcies by incorporated companies, was served upon a bank half an hour after it opened for business, by which its operations were suspended, that the holder of a check, received after banking hours on the preceding day, was not bound to show a presentment of the check for payment, to entitle him to recover upon the original consideration, although it appeared that the drawer had sufficient funds in the bank to pay the check, and that it would have been paid had it been presented before the service of the injunction. Matter of Brown, 2 Story, 502; Searle v. Norton, 2 M. & R. 401; Keene v. Beard, 8 C. B. N. S. 380 (98 E. C. L. R.); Blair & Hoge v. Wilson, 28 Grat. 171; Clark v. National Metropolitan Bank, 2 MacArthur, 249; Deener v. Brown, 1 MacArthur, 350; Griffin v. Kemp, 46 Ind. 172.

[2] Hoyt v. Seeley, 18 Conn. 360, Waite, J.

[3] In Smith v. Jones, 2 Bush (Ky.), 103, the check was dated April 12th, 1862, and was not presented until the 13th of January, 1863, at the Citizens' Bank of Louisiana, at New Orleans, on which it was drawn. The city had in the mean-

[4] Syracuse, &c. R. R. v. Collins, 57 N. Y. 641.

§ 1588. If however suit be brought against the drawer, and there has not been due presentment and notice, the burden of proof is upon the plaintiff, to show that the drawer has suffered no injury—injury being *prima facie* presumed.[1] But when it is shown that the drawer had no funds, or withdrew them, this presumption of injury is rebutted, and he is chargeable without presentment or notice.[2] But while it is true that the burden of proof is upon the plaintiff to show that no loss or injury resulted to the drawer when he seeks to excuse the non-presentment of the check; yet where the suit is brought on the pre-existing debt for which the check was given, it has been held that the defendant who pleads payment must not only show delivery to and acceptance of the check by the plaintiff, but also that through the plaintiff's laches, loss or injury has accrued.[3]

§ 1589. It follows from the principles already stated, that if the bank on which the check is drawn remains solvent and able to pay, the drawer will remain bound after presentment and refusal of payment, although many months, or even years, have elapsed since the check was drawn.[4] And when

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time been captured by the Federal forces, and the funds on which the check was drawn had become worthless. Robertson, J., said: "Unlike a bill of exchange, a check does not require 'due diligence,' and apparent laches in presenting it for payment does not exonerate the drawer, unless by unreasonable delay he has suffered loss, and then he is entitled to relief *pro tanto*. But the evidence authorizes the deduction, that for nearly a month after the date of the appellee's check, the appellants, if only reasonably provident and diligent, might have presented the check and recovered the amount of it. And it is evident that when nine months after its date, the check was presented for payment, the property of the appellants was almost worthless, and could not be drawn from the bank, or exchanged or circulated within the Federal lines, consistently with national policy or law." It was held, therefore, that there could be no recovery on the check.

[1] Ford v. McClung, 5 W. Va. (Hagans) 166 (1872); Little v. Phœnix Bank, 2 Hill, 425; Daniel v. Kyle, 1 Kelly, 304; Harbeck v. Craft, 4 Duer, 122; see Conroy v. Warren, 3 Johns. Cas. 259; 2 Parsons N. & B. 71.

[2] Eichelberger v. Finley, 7 Har. & J. 381; Healy v. Gilman, 1 Bos. 235; 2 Parsons N. & B. 71; see Chapter XXXI, on Excuses for want of Presentment and Notice, § 1073, p. 166, *et seq.*

[3] Syracuse, &c. R. R. Co. v. Collins, 3 Lans. 29.

[4] Bell v. Alexander, 21 Grat. 6; Emery v. Hobson, 63 Me.; Byles on Bills (Sharwood's ed.) [*220], 93.

the holder sues upon the check, and proves the presentment to the bank, and due notice of dishonor to the drawer, it will devolve upon the latter to show that the bank had become insolvent, and unable to pay, after the check was drawn and before presentment was made, in order to defeat a recovery.[1]

§ 1590. *Within what time check must be presented.*—A failure of the bank or banker who is drawee of the check, and who held on deposit a fund to meet it, which is thereby lost, presents the usual, if not the only case, in which delay of the holder in making presentment, or giving notice of dishonor, devolves loss upon him. But it is by no means an infrequent case, and therefore important to be considered. If at the time the check was delivered to the payee, the bank was solvent, and held funds of the drawer sufficient to meet it, it would be a fraud for the drawer, after giving a check upon them, to withdraw the amount which should pay it; and as he could not rightfully withdraw the amount, it would be unjust to require that, however long the check holder might permit it to remain, it should be at the drawer's risk. The law has therefore declared that it must be presented within a reasonable time; at the expiration of which such risk terminates as to the drawer, and becomes the risk of the holder if he permits the deposit to remain in bank. Such reasonable time has been definitely fixed by the decisions as follows:

(1) *First, as between the drawer and payee.*—Where the payee to whom the check is delivered by the drawer, receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer, by presenting it for payment at any time before the close of banking hours on the next day (by which is meant the next secular day, for if he receive it on Saturday, he has until the close of banking hours on Monday to present it);[2] and if in the

[1] Stewart v. Smith, 17 Ohio St. 85, 86.

[2] Mead v. Caswell, 9 Mod. 60; O'Brien v. Smith, 1 Black (U. S. Sup. Ct.) 99, where it was held that a check received on Saturday might be presented any time during banking hours on Monday.

meantime the bank fails, the loss will be the drawer's.[1] "The rule to be adopted," said Lord Ellenborough, in a leading case, "must be a rule of convenience; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law merchant? It cannot alter it. Banks would be kept in continual fever, if they were obliged to send out a check the moment it was paid in."[2] The allowance of a day to present the check does not extend to an agent who receives one for a debt of his principal. He must present it *instanter*.[3]

§ 1591. If the bank, in the same place where the check was drawn, should stop payment after the commencement of business hours on the day following, it will be no defense to the drawer that the check would have been paid if presented at an early hour of the day; and it seems that the stoppage of payment by the bank before the close of business hours on that day would be a full excuse for want of presentment altogether, as the holder has been guilty of no negligence at the time of stoppage, and from his subsequent delay no loss could accrue to the drawer.[4]

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[1] Syracuse, &c. R. R. Co. v. Collins, 3 Lans. (N. Y.) 29; 57 N. Y. 641; Smith v. Miller, 6 Rob. (N. Y.) 157; 43 N. Y. 171 (1870); 52 N. Y. 546 (1873); Kelty v. Bank, 52 Barb. 328; Nunnemaker v. Lanier, 48 Barb. 234; Merchants' Bank v. Spicer, 6 Wend. 443; Cawein v. Browinski, 6 Bush (Ky.), 457; Shrieve v. Duckham, 1 Lit. 192; Bickford v. First Nat. Bank, 42 Ill. 238; Morrison v. Bailey, 5 Ohio St. 13; Simpson v. Pacific, &c. Ins. Co. 44 Cal. 139; Himmelman v. Hotaling, 40 Cal. 111; Ritchie v. Bradshaw, 5 Cal. 228; Veazie Bank v. Winn, 40 Me. 60; Bailey v. Bodenham, 16 C. B. N. S. 288; 111 E. C. L. R.; Boddington v. Schlencker, 4 Barn. & Ald. 752; Robson v. Bennett, 2 Taunt. 410; Rickford v. Ridge, 2 Camp. 537; Blair & Hoge v. Wilson, 28 Grat. 171. See Clark v. National Metropolitan Bank, 2 MacArthur, 249; Andrews v. German National Bank, 9 Heisk. 211; Story on Notes, § 493; Story on Bills, §§ 470, 471; Thomson on Bills (Wilson's ed.), 119; Roscoe, 9, 158.

[2] Rickford v. Ridge, 2 Camp. 537. Lord Mansfield, in the case of Tindal v. Brown, 1 T. R. 168, states, that in the previous case of Metcalf v. Douglas, "the jury struggled so hard in spite of the opinion of the court to narrow the rule, that they held, you must, in certain cases, demand payment of a banker's draft within an hour." The law of England is now well settled to be as stated in the text.

[3] Smith v. Miller, 43 N. Y. 171; Farwell v. Curtis, 7 Bissell, 165.

[4] Syracuse R. R. Co. v. Collins, 3 Lans. 29.

§ 1592. Where the payee receives the check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has reached him by due course of mail.[1] This period, which is requisite for the convenient presentment of the check by diligent means, must have been contemplated by the drawer, and he remains absolutely liable although the bank might fail pending its duration. Where a check was forwarded by mail by the bank with which the payee deposited it for collection in due course of mail, and it was lost, and the collecting bank did not discover the loss until the sixteenth day thereafter, it was held chargeable with negligence in not sooner discovering the loss, and liable for the amount.[2]

§ 1593. But while the drawer will not be discharged where the check is drawn on a bank in the same place if presentment be made on the next day, yet, if presentment for payment be actually made on the very day the check is drawn, and payment tendered, the holder cannot then change his mind and leave the funds at the drawer's risk until the next day. He is allowed until the next day as matter of convenience and accommodation to him; and while he need not hurry to make presentment the same day, having once done so, he has fixed the money at his own risk. This was illustrated in a recent California case, where a check was drawn on a bank in Sacramento city about nine o'clock in the morning, and immediately thereafter the check was presented and payment tendered, but declined. At two o'clock the same day the holder called

[1] Middletown Bank v. Morris, 28 Barb. 616; Smith v. Jones, 20 Wend. 192; Moule v. Brown, 4 Bing. N. Cas. 266; Hare v. Henty, 30 L. J. C. P. 302; Rickford v. Ridge, 2 Camp. 537; Bond v. Warden, 1 Collyer, 583; Story on Notes, § 493; Byles (Sharswood's ed.) [*20], 94.

[2] Shipsey v. Bowery National Bank, 59 N. Y. 485.

again and demanded payment, but the bank had then suspended; and it was held that the drawer could not be bound.[1]

§ 1594. (2) *Second, as between the indorser and indorsee of a check*, the same rules which regulate diligence as betwen the drawer and the payee apply—the indorser being regarded as a new drawer, and the indorsee as a new payee;[2] and what is diligence as between them has been already stated.

§ 1595. (3) *But in the third place, as between the indorsee*

[1] Simpson v. Pacific, &c. Ins. Co. 44 Cal. 143: Crockett, J., saying: "On these facts the question to be solved is, whether the holder of a bank check drawn against a sufficient fund, who presents it for payment within the proper time, and to whom payment is then tendered by the bank, but who declines to accept the money at that time, preferring to retain the check temporarily, can hold the drawer of the check by again presenting it for payment at a later hour of the same day, when payment is refused and due notice of dishonor given. The question is novel and not free from difficulty; but we shall be materially aided in its solution by first ascertaining with accuracy what are the elements which constitute a presentation for payment in its legal sense. The presenting of a check for payment implies that the holder of it desires, and is ready and willing to accept payment. It would be a contradiction in terms to say that the holder of a check presented it for payment, intending and averring at the time that he would not accept payment. If he should present it for the sole purpose of ascertaining whether the signature was genuine, or whether the drawer had funds to his credit, or merely for the purpose of being identified as the person entitled to payment, not intending then to present it for payment, it is clear that this would not constitute a demand of payment, which, in its very nature, imports a willingness on the part of the holder to accept the money at that time. But if the check is presented for payment, with the present intention in the mind of the holder to accept the money if tendered, this must be deemed to be a demand of payment for all purposes affecting the rights of the drawer, even though the holder should afterward change his purpose and decline to accept the money when tendered by the bank. Having once demanded payment in due form and within the proper time, and the bank being then and there ready and willing and offering to pay the check, the holder is not at liberty after this to retract or waive his demand and decline to accept payment without thereby releasing the drawer from further liability on the check. If the holder declines to accept payment when it is tendered on a proper demand, the liability of the drawer ceases, for the reason that his undertaking was that the check would be paid when payment should be first demanded in due form and within the proper time; but he does not undertake that it will be paid on a second demand, when payment has been tendered and refused on a prior demand made in due form and within the proper time."

[2] Mohawk Bank v. Broderick, 10 Wend. 304; 13 Wend. 133.

or assignee and the drawer, it does not follow from what has been said, that every indorsee or assignee has the same period from the time he received it, within which to present the check, as against the drawer; and that the drawer would be still liable in all events, if the last holder presented it within a day, or forwarded it by the next mail after he himself received it. On the contrary, the period within which the check must be presented, in order to make the drawer's liability absolute, is itself absolute. And no transfer or series of transfers can prolong the risk of the drawer beyond it. Though each party is allowed the same period, as between himself and his immediate predecessor, that the payee had as between himself and the drawer, yet no transferee can stand on any better footing than his transferrer in respect to the time within which the check must be presented, in order to render the drawer's and previous indorsers' liabilities absolute, in the event of a failure of the bank.[1] And this rule is clearly founded upon just principles, for the drawer cannot rightfully withdraw the deposit, and as it has passed beyond his control, it would be wrong to hold that it should remain indefinitely at his risk because it suited the convenience of others to transfer instead of presenting the checks.[2] And a check, unlike a bill of exchange, which need not be drawn upon a deposit, is generally designed for immediate payment, and not for circulation.[3]

§ 1596. *Excuses for failure or delay in making presentment for payment or giving notice of dishonor.*—There may, however, exist sufficient excuse, on the part of the holder, for delay or failure in making presentment, or giving notice. Thus, if the drawer had no funds in the bank at the time of drawing the check, or subsequently withdrew them, he commits a

[1] St. John v. Homans, 8 Mo. 382; Foster v. Paulk, 41 Me. 425; Reid v. Reid, 11 Tex. 585; Lilley v. Miller, 3 Nott & McC. 257; Brown v. Lusk, 4 Yerg. 210; Taylor v. Young, 3 Watts, 343; Harker v. Anderson, 21 Wend. 372; Cruger v. Armstrong, 3 Johns. Cas. 5; Story on Notes, §§ 495, 496.

[2] Boehm v. Sterling, 7 Term R. 423; Story on Notes, § 496; Byles (Sharswood's ed.) [*20, 21], 95.

[3] Down v. Halling, 4 Barn. & C. 333.

fraud upon the payee, and can suffer no loss or damage from the holder's delay or failure in respect to presentment and notice. He is therefore liable without presentment or notice.[1] And so when the drawer directs the bank not to pay the check, the same rule applies.[2] And when the bank or banker has been restrained from paying out money by order of court, or from transacting business, the necessity of presentment and notice is dispensed with.[3]

The indorser of a check stands upon a different footing from that of the drawer. He cannot be presumed to know, as the drawer must know, the state of the latter's account with the bank; and although the drawer without funds will be absolutely bound, the indorser of his check will not be so bound, unless it be affirmatively shown that he knew the fact that there were no funds to meet it, and thus participates in the wrong committed upon the holder.[4] If the holder of a check presents it when he knows there are no funds to meet it, he participates in the drawer's fraud, and though the amount be passed to his credit the bank will not be bound.[5]

If the holder of the check becomes unable to present it within the requisite time, by reason of the removal of the bank and the disturbed condition of the country, he should give notice of the fact to the drawer, and offer to return the check; and if he fails to do so, the drawer is not liable.[6]

[1] Bell v. Alexander, 21 Grat. 6; Hoyt v. Seeley, 18 Conn. 353; Cushing v. Gore, 15 Mass. 59; True v. Thomas, 16 Me. 36; Norris v. Despard, 28 Md. 491; Eichelberger v. Finley, 7 Har. & J. 381; Conroy v. Warren, 3 Johns. Cas. 259; Murray v. Judah, 6 Cow. 484; Commercial Bank v. Hughes, 17 Wend. 94; Franklin v. Vanderpool, 1 Hall, 78; Healy v. Gilman, 1 Bosw. 235; Matter of Brown, 2 Story, 502; Valk v. Simons, 4 Mason, 113; Blankenship v. Rogers, 10 Ind. 333; Lilley v. Miller, 2 N. & McC. 257; Coyle v. Smith, 1 E. D. Smith, 300; Kemble v. Mills, 1 Man. & G. 757; 2 Scott N. R. 121; 9 Dowl. 446; see *ante*, §§ 1073, *et seq.*

[2] Jack v. Darrin, 3 E. D. Smith, 557; Purchase v. Mattison, 6 Duer, 587; Whaley v. Houston, 12 La. Ann. 585; Woodin v. Frayze, 38 N. Y. Sup. Ct. 190.

[3] Lovett v. Cornwall, 6 Wend. 367. [4] Humphreys v. Bicknell, 2 Litt. 300.

[5] Peterson v. Union Nat. Bank, 52 Penn. St. 207; Martin v. Morgan, 3 Moore, 645; Thomson on Bills, 270.

[6] Purcell v. Allemong, 22 Grat. 739.

And though the holder of the check is himself physically disabled, so that he cannot proceed in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for non-presentment.[1]

If the bank has removed from the place upon which the check is drawn, and the check be returned to the drawer or his agent, the debt for which it was given remains due.[2] Other circumstances (such as those which excuse delay in presentment of an ordinary bill) may excuse delay in presenting the check. The necessity of procuring the indorsement of a school board, which had to be convened, and which requires time, was held sufficient to excuse delay of a week in a recent Pennsylvania case.[3]

§ 1597. It not infrequently happens that the drawer has only a portion of the amount in bank necessary to pay his check, and the question then arises, whether the deficiency of his deposit is an excuse for want of presentment and notice. We should unhesitatingly say that the drawer of an over-check is bound without demand or notice. A check is intended to be the representative of cash. It is the business of the drawer to know the state of his accounts with his bank, and whether through fraud or carelessness he makes the representation that he has cash to meet it, as he does by the act of drawing it, it would only put a premium upon looseness in commercial transactions to permit him to shield himself behind the plea of want of presentment or notice. It is he who is chargeable with the duty of notice as to his own funds, and he perpetrates a legal fraud when he undertakes to transfer and assign to another that which he does not possess. It will be readily seen that the difference between checks and bills of exchange induces this relaxation of the strict rules as to presentment and notice in respect to the former. The check purports to be drawn upon an actual deposit, and it is only when there is a deposit that the

[1] Purcell v. Allemong, 22 Grat. 739. [2] Larue v. Cloud, 22 Grat. 513.
[3] Muncy Borough School Dist. v. Commonwealth, 84 Penn. St. 471.

drawer has a right to expect that it will be honored; the officers of the bank would commit a wrong upon the stockholders to honor it without funds; while in the case of a bill of exchange, it is frequently drawn upon consignments, expectation of funds, or accommodation arrangements, which the drawer may reasonably confide in.

In a Maryland case, where there were two checks drawn, one for $1,450 and one for $1,500, both were dated March 26th. At that date the balance to the drawer's credit was $500, on the next day $400, and for several days afterward from $200 to $400. The checks were presented June 3; and in May the bank had appropriated the balance on hand to a debt due it by the drawer. The drawer was held bound to the holder without notice of non-payment. And Dorsey, J., after referring to the cases on bills of exchange, said: "But it is conceived that, waiving all exceptions to the soundness of these decisions, they bear no application to the case now under consideration. They were made on transactions between individual correspondents who may have had a mutual confidence and credit, and were perfectly competent to honor each other's bills, drawn either with or without effects. Not so as to officers of the public banking institutions in this State. With them the customers of the bank have no accommodation credit, and without a gross violation of their trust, they can honor no check or draft upon them beyond the amount of deposits standing to the credit of him by whom such check or draft may be drawn."[1]

§ 1598. Neglect or delay in respect to presentment and notice may be waived by the drawer in like manner as the drawer of a bill of exchange.[2] Or the drawer may extend the time for presentment by any agreement, express or implied, the understanding of the parties at the time the check was drawn entering into the contract.[3]

[1] Eichelberger v. Finley, 7 Harris & J. 381, 387.

[2] See Chapter on Excuses for Want of Presentment and Notice, *ante*, pp. 101, *et seq.*

[3] Woodruff v. Plant, 41 Conn. 344.

In no case can the period within which it will be sufficient for the check to be presented by the principal holder, be prolonged by its being placed in the hands of a banker or other agent for collection.[1]

§ 1599. The bank undoubtedly has a right to an actual presentment of the check, and this is generally made by the holder or his agent at the counter of the bank.

It seems that sending a check by post to the drawee bank, with a demand of payment, is a good presentment. In such a case, Erle, C. J., said: "I do not mean to affirm that this was a good presentment. I incline to think it was. But unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly."[2] This method of presentment is doubtful, and it has been recently said: "In these days, when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object."[3] Where the check is sent to the drawee bank by mail, for collection and return, the holder makes the drawee his agent, and must bear any loss arising after the time when the check could have been presented by express or other usual method.[4]

§ 1600. *As to the protest of checks*, while they have not all the incidents of bills of exchange, they may be yet included in the term when applied to the steps to be taken in case of dishonor. The same reasons that would authorize the protest of an inland bill of exchange for non-payment, would authorize the protest of a check, the payment of which had been refused on presentment. And therefore where a statute provides for the protest of inland bills and

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[1] Moule v. Brown, 4 Bing. N. Cases, 266 (33 E. C. L. R.); Morse on Banking, 324; Byles on Bills (Sharswood's ed.) [*20], 94; see *ante*, § 1595.

[2] Bailey v. Bodenham, 16 C. B. J. Scott, N. S. (111 E. C. L. R.) 294 (1864); see Morse on Banking, 334.

[3] Farwell v. Curtis, 7 Bissell, 162 (1876), Hopkins, J.

[4] Farwell v. Curtis, 7 Bissell, 162.

promissory notes, a check would be embraced within the description of paper denominated inland bills of exchange, and might be protested in like manner.[1] And if drawn in one State upon another, a protest would doubtless be necessary in order to charge an indorser, the check being in that event a species of foreign bill.[2] It has been said in a well known case, that a check "is not protestable, or, in other words, protest is not requisite to hold either the drawer or an indorser."[3] But the remark, it is conceived, applies only to inland checks.

SECTION IV.

CERTIFICATION OF CHECKS.

§ 1601. A check being always payable immediately on demand, the holder can only present it for payment, and the bank can only fulfill its duty to its depositor by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check. And the bank has no right, as against the drawer, to do anything else but pay it. Consequently there is no such thing as acceptance of checks in the ordinary sense of the term. For acceptance ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee "accepts" to do so, thereby becoming the principal debtor, and the drawer being his surety. But still, by consent of the holder, the bank may enter into an engagement quite similar to that of acceptance, by certifying the check to be "good" instead of paying it. And by so doing (1) The bank becomes the principal and only debtor; (2) the holder by taking a certificate of the check from the bank,

[1] Moses v. Franklin Bank, 34 Md. 574; Norris v. Despard, 28 Md. 491.

[2] Harker v. Anderson, 21 Wend. 372; see Edwards on Bills, 396.

[3] Morrison v. Bailey, 5 Ohio St. 13 (1855). In Pollard v. Bowen, 57 Ind. 234, (1877), Niblack, J., says: "A protest of a check is not necessary in case of its non-payment." See also Jones v. Heiliger, 36 Wis. 149; Griffin v. Kemp, 46 Ind. 172.

instead of requiring payment, discharges the drawer; (3) and the check then circulates as the representative of so much cash in bank, payable on demand to the holder. Such in brief is the effect of the certification of a check. It has been said to be, and obviously is, "equivalent to acceptance"[1] in respect to the obligation it creates upon bank; but it would be confounding terms to regard it as altogether the same thing in its effects upon the relation of the parties.

§ 1602. The certification of checks is an expedient and outgrowth of modern commerce quite recent in its origin, but now of daily and extensive occurrence. It was a practice unknown when Kyd and Byles wrote their treatises. It is not alluded to in the works of Story, and receives but brief mention in the elaborate volume of Parsons, written in 1862, and published as recently as 1868. And yet now the reports are filled with cases on the subject; and recent writers—Morse[2] and Bigelow[3] and Redfield[4]—give it considerable prominence and attention. The fact stated by the United States Supreme Court that "it is computed by competent authority that the average daily amount of such (certified) checks in use in the city of New York is not less than one hundred millions of dollars,"[5] is sufficient warrant for an enlarged statement of the principles affecting them.

[1] Merchants' Bank v. State Bank, 10 Wall. 648.

[2] Morse on Banking.

[3] Bigelow on Estoppel.

[4] Redfield & Bigelow's Lead. Cas.

[5] Merchants' Bank v. State Bank, 10 Wall. 648, Justice Swayne saying: "By the law merchant of this country, the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee; that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available, also, to him for all the purposes of money." * * *

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with

§ 1603. In the *first* place, the bank becomes at once the principal debtor.[1] When the holder presents the check to the bank, the latter can only respond to the demand for payment by making payment. But if it be agreed to between them, the check is certified to be "good;" and thus, in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, a certified check is a short-hand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms.

Thus the bank ceases to be the debtor of the original depositor, and becomes the debtor of the holder of the check, who may demand the amount, and sue the bank for its recovery at any time,[2] even after the lapse of many years.[3] It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it, though notified by the drawer not to do so.[4] It will also be too late for the bank to say that the check was forged, and was not in fact the drawer's, unless it be still in the hands of one who was guilty of the forgery, or had knowledge of or complicity in it, for it has conceded its genuine-

safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money.

"It is computed by a competent authority that the average daily amount of such checks in use in the city of New York is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their validity."

[1] Andrews v. German National Bank, 9 Heisk. 217; Merchants' Bank v. State Bank, 10 Wall. 648; Essex Co. Bank v. Bank of Montreal, 7 Biss. 193; First National Bank v. Leach, 52 N. Y. 350; Freund v. Importers, &c. Bank, 19 N. Y. S. C. (12 Hun), 537.

[2] Gerard Bank v. Bank of Penn Township, 39 Penn. St. 92; Morse on Banking, 281–283.

[3] Gerard Bank v. Bank of Penn Township, 39 Penn. St. 92. In this case the check was certified October 7th, 1852. The drawer withdrew his funds October 10th, 1854; and the holder demanded payment September 3d, 1859. The bank was held liable, the statute of limitations not having accrued.

[4] Freund v. Importers, &c. Bank, 19 N. Y. S. C. (12 Hun), 537.

ness, and indeed asserted it by certification.[1] Nor can it say that there were in fact no funds of the drawer to meet the check, for its certificate is an assurance that there were such funds, and that it will apply them to that purpose.[2] These doctrines are now universally settled, and the United States Supreme Court has declared that it could not inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon them.[3] In New York it has been held that the legal effect of certification is only to warrant the signature, and not the terms of the check; that evidence that it was understood by the custom of merchants to warrant more is inadmissible; that the teller has no authority to warrant more, and his act in doing so would not bind the bank.[4]

§ 1604. In the *second* place, the holder, by taking a certificate of the check instead of payment, discharges the drawer. This results from what has been already said. If the bank refuses payment, the drawer should be notified. But if the holder receives something else in lieu of payment, it is the same as payment; and as the drawer cannot legally withdraw the funds after checking on them, it would be unjust that they should be held at his risk or his liability on the check extended.[5] If the holder of a certified check indorse it his indorsee may hold him liable as well as the bank.[6]

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[1] See *infra*, §§ 1359, *et seq.* and Chapter XVIII, on Acceptance, §§ 532, *et seq.* vol. 1.

[2] Espy v. Bank of Cincinnati, 18 Wall. 621.

[3] Merchants' Bank v. State Bank, 10 Wall. 648.

[4] Sec'y Bank v. National Bank, 67 N. Y. 458. *Contra*, La. Bank v. Citizens' Bank, 28 La. An. 189.

[5] First National Bank v. Leach, 52 N. Y. 350 (1873), Peckham, J.: "The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well regulated bank adopts this practice to protect itself. * * It follows, that after a check is certified the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. The money is no longer his." Morse on Banking, 382; Essex Co. National Bank v. Bank of Montreal, 7 Bissell, 197.

[6] Mutual Bank v. Rotge, 28 La. An. 933.

§ 1605. In the *third* place, the check when certified circulates as the representative of so much cash in bank, payable whenever demanded, to the holder. It is then like cash; but still it is not the same as cash, for "*nullus simile est idem.*" Frequently a depositor procures his own check to be certified before he offers it in payment. In such cases it does not lose its character as a check in any particular,—it only has the additional credit imparted to it by the certificate.

§ 1606. *As to how a check may be certified.—No particular form of certification is requisite.* Ordinarily the bank officer simply writes the word "good" across the face of the instrument.[1] Sometimes his name, or initials, is added.[2] In England a well known mark was at one time generally used for this purpose; but by statute now a distinct promise, written and signed, is requisite. In the absence of any statutory provision on the subject, the mere verbal statement of the bank officer that the check is "good,"[3] or a promise on the part of the bank to pay it, will be sufficient to operate as certification, provided such statement or promise be communicated to the holder, and induce him to take the check.[4] But unless so communicated it would not be.[5] And it has been held by the United States Supreme Court, that even where so communicated, it would not bind the bank further than as to the genuineness of the drawer's signature, and the state of his account; and if the check were "raised" in respect to the amount, the bank giving information that it was "good," and not intending to certify it for circulation, would not be bound.[6] Ordinarily the certification states no time of pay-

[1] Barnet v. Smith, 10 Fost. 256.

[2] Morse on Banking, 284.

[3] Barnet v. Smith, 10 Fost. 256; Pope v. Bank of Albion, 59 Barb. 226, the Court said: "Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same." See Morse on Banking, 286, 287.

[4] Nelson v. First Nat. Bank, 48 Ill. 36; Carr v. Nat. Sec'y Bank, 107 Mass. 48. Bank v. Pettel, 41 Ill. 492.

[5] Espy v. Bank of Cincinnati, 18 Wall. 621 (1873), Miller, J., saying: "There

ment, and the check is then payable instantly on demand; but if the certificate specify a future day of payment, it is binding between the bank and the holder receiving it.[1]

§ 1607. *As to what checks may be certified, and when.*— No officer of the bank has any authority to certify a check when there are no funds of the drawer to meet it. And it is only in favor of *bona fide* holders for value, and without notice that, without fund to meet the check the law will enforce the liability of the bank upon its officers' certificate.[2] Nor can any officer or agent of the bank certify his own checks; for no one acting in a fiduciary capacity as trustee or agent can employ his position for his own private benefit. And where the name of the officer who certifies the check is the same as the drawer, that circumstance is sufficient to charge all persons dealing with the check that they are the same person; and if such be truly the case, and the check were improperly certified, no holder could recover.[3] No officer, moreover, has any implied authority to certify a check until it is presented for payment, when, of course, it must be actually due and payable. Therefore, should any officer certify a post-dated check, such check bears on its face, until the day of its date arrives, notice and information to all parties receiving it, that it has not been certified in the usual course of business; and if it turn out that the drawer had no funds on deposit at the time of the certification, no party so receiving it can hold the bank liable.[4]

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was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it in circulation. Nothing was said or done by the bank officer which could be transferred with the check as a part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would." But see Louisiana National Bank v. Citizens' Bank, 28 La. An. 189.

[1] Bank of England v. Anderson, 4 Scott, 50.

[2] Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Morse on Banking, 194, 195; Claflin v. Farmers', &c. Bank, 25 N. Y. 293; Cooke v. State Nat'l Bank, 52 N. Y. 115.

[3] Claflin v. Farmers', &c. Bank, 25 N. Y. 293, overruling same case in 36 Barb. 540.

[4] Clarke Nat. Bank v. Bank of Albion, 52 Barb. 593. In this case the check

§ 1608. If the bank certifies a check to be good by mistake, under the erroneous impression that the drawer had funds on deposit, when in fact he had none, or has been induced by some fraudulent representation to certify it as good, the certification may be revoked and annulled, provided no change of circumstances has occurred which would render it inequitable for such right to be exercised. If the check still remains in the hands of the holder who held it when it was certified, and the mistake is discovered and notified to him so speedily that he has time afforded him to notify and preserve the liability of indorsers, the bank may retract its certificate.[1] But if another person has become the holder of

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was dated January 10th, 1866; but it was drawn and certified early in December, 1865, and discounted about the same time to Ward & Brother, bankers. The check was for $6,000, and the drawer when it was certified had only $16.75 to his credit; and he made no deposit to meet it. The Court, saying: "Checks are never presented for acceptance, but only for payment, to enable the holder immediately to demand and receive the money stated therein—and in theory are not intended to circulate as commercial paper. They are always supposed to be drawn upon a previous deposit of funds, and are an appropriation of so much of the money in the hands of the banker to the holder of the check (Story on Promissory Notes, §§ 488, 489). They must be regarded as drawn and dated the day they bear date (The Mohawk Bank v. Broderick, 13 Wend. 133). Where a check is drawn and negotiated before it bears date, the effect is, that the same is payable on demand, on and after the day on which it purports to bear date, and nothing more (s. c. 10 Wend. 308). They are not due before payment is demanded, in which respect they differ from bills of exchange on a particular day (Chitty on Bills (7th Am. ed.) 322; Harker v. Anderson, 21 Wend. 374). From these propositions of law, it follows that this check was certified by the cashier before its payment could have been legally demanded, and before it could be presumed that the drawer had made a deposit for its payment; all of which appeared on the face of the paper, and was in the law full notice to Ward & Bro. Post-dated checks are instruments often used, and their nature and character are well understood by bankers and the trading community. By all such persons it is regarded that the drawer is not in funds at the bank on which he draws his check, when he makes and delivers the same, and does not expect to be until the arrival of the date inserted in the check. Ward & Bro. could not then have maintained an action on the check against the bank, because: *First*. This check was certified by the cashier before it was payable by its terms, and before any legal demand of payment was or could be made. *Second*. It was certified when the presumption is that the drawer had no funds in the bank to meet it. *Third*. Ward & Bro. were not *bona fide* holders of this check without notice of the facts, which vitiates the certification.

[1] Irving Bank v. Wetherald, 36 N. Y. 335; 34 Barb. 323; see Chapter XVIII, on Acceptance, § 493, vol. 1.

it, or circumstances have so changed that the rights of the holder would be prejudiced, and especially if it has been paid to a *bona fide* holder without notice, it is absolutely estopped from doing so.[1]

§ 1609. *As to who may certify for the bank.*—What officers of the bank have implied power *ex officio* to certify checks, is next to be considered. The board of directors undoubtedly have, for they are the bank's managers and its representatives in the broadest sense.[2] And the president of the bank, who is *ex officio* their president and mouthpiece, also undoubtedly has such power.[3]

§ 1610. The cashier undoubtedly has implied power to certify checks, and it has been so held in numerous cases.[4] In Massachusetts alone has the contrary doctrine prevailed, on the ground that it is a power to pledge the credit of the bank to its customers, which, by the very constitution of a bank, resides only in the president and directors. And there it has been held that even if it were proved that the teller had by usage certified checks, it would be a bad usage, and could not be upheld.[5] But besides the authorities cited in the note as sustaining the cashier's implied power, it has been decided by the United States Supreme Court, that a bank is liable upon checks certified by its cashier, although it was proved that he acted without authority, and although it was not shown that he had ever certified checks before, or that the cashiers of banks in the same place were accustomed to certify checks. The Court said: "The power of the bank to certify checks has been sufficiently considered. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come

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[1] Bank of Republic v. Baxter, 31 Vt. 101.

[2] See Chapter on Corporations as Parties.

[3] Claflin v. Farmers', &c. Bank, 25 N. Y. 293.

[4] Clarke National Bank v. Bank of Albion, 52 Barb. 592; Pope v. Bank of Albion, 59 Barb. 236; Cooke v. State National Bank, 52 N. Y. 115.

[5] Mussey v. Eagle Bank, 9 Metc. 313; Atlantic Bank v. Merchants' Bank, 10 Gray, 532.

into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. When the money is in the bank, he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office."[1] And the exercise of such power is rather a mere transfer of credit from the drawer of the check to the holder of it, than a pledge of the credit of the bank.[2]

The teller of the bank also undoubtedly has an inherent implied power to certify checks, for, though a subordinate of the cashier, he is simply an arm with which certain portions of his work are performed;[3] and it has been thought that he is the more proper officer to discharge this particular duty.[4] But the fact that the teller may certify checks, by no means implies that when he may the cashier may not.

The assistant cashier of a bank has no implied power to accept or certify a check, and where such an officer wrote on a check presented to the bank, "Accepted, A. J. Chester, A. Cash," it was held that even a *bona fide* holder for value was chargeable with an infirmity in the transaction, the style of the acceptance putting him on guard as to the authority of the officer.[5]

§ 1611. There is this limitation upon the implied power of the president or other officer of a bank to certify checks: he cannot certify his own check, and any party taking a check drawn by a party, and then certified by him for a bank as its officer, takes it with notice of the double relation he is acting in, and cannot be placed upon the footing of a

[1] Merchants' Bank v. State Bank, 10 Wall. 648.

[2] Morse on Banking, 192.

[3] Farmers', &c. Bank v. Butchers', &c. Bank, 14 N. Y. 624; 16 N. Y. 133; Mead v. Merchants' Bank, 25 N. Y. 146; Irving Bank v. Wethereld, 36 N. Y. 335; *contra*, Mussey v. Eagle Bank, 9 Mete. 313.

[4] Farmers', &c. Bank v. Butchers', &c. Bank, 14 N. Y. 624; 16 N. Y. 133.

[5] Pope v. Bank of Albion, 57 N. Y. 127.

bona fide holder without notice. This doctrine rests on the principle that no person can act as agent of both parties to a contract, although he may himself have no interest on either side; nor can he act as agent in regard to a contract in which he has any interest, or in which he is a party on the side opposite to his principal.[1]

SECTION V.

WHOSE CHECKS SHOULD BE PAID BY THE BANK.

§ 1612. When a deposit has been made in a bank, its officers should be careful that no portion of it is paid out upon the check of any party but the depositor or depositors. The proper and only safe rule for the bank to adopt is to require the signature to be identical in terms with the credit on its books.[2] Thus if the credit be simply to A. B., let the check be signed simply A. B.; and if it be to "A. B., trustee," or "A. B., trustee for C. D.," let the signature be *in totidem verbis*. So if several persons not partners make a deposit to their joint credit, the signature of each one should be required.[3] But if it be to their joint and several credit, the check of any one may be honored.[4] Where one or more of the joint depositors abscond, equity will relieve the others.[5] Where deposit is made by A. B., trustee for C. D., and A. B. dies, no trust is created.[6]

§ 1613. *In the case of a partnership deposit* it should, as a rule, be paid out only upon a check signed in the copartnership name. But any one of the firm is empowered to

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[1] Claflin v. Farmers', &c. Bank, 25 N. Y. 294; overruling s. c. in 36 Barb. 540; see also New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 64; Titus v. Great Western Turnpike Co. 5 Lans. 253 (5 N. Y. S. C. R.); *ante*, § 1607.

[2] Tryon v. Okley, 3 G. Greene (Iowa), 289.

[3] Innes v. Stephenson, 1 M. & R. 145; Stone v. Marsh, Ryan & M. 364; Sloman v. Bank of England, 14 Sim. 459; 9 Jur. 243; Dixen's Case, 2 Lewin Cr. Cas. 178.

[4] Morse on Banking, 266.

[5] *Ex parte* Hunter, 2 Rose, 382; *Ex parte* Collins, 2 Cox, 427.

[6] Clark v. Clark, 108 Mass. 514.

make such signature. If there are dormant partners, the bank is not bound to pay a check signed by one of them in the partnership name, unless it knew or should have known the fact that the signer was a member of the copartnership; for otherwise its refusal to pay would be legal and proper.[1] Whether or not a copartner could bind the firm by signing the names of the several partners has been questioned. It would seem that he could.[2] And where a check was signed by one partner "for A. B. C. and D. C.,"[3] and another "A. & Co., per procuration of A.,"[4] they were each held sufficient as copartnership checks.

§ 1614. It is lawful for a bank to show that a deposit standing in the name of an individual partner was really a partnership deposit; but it would be necessary to go further and show that it was really paid in on partnership account, and was designed to constitute, or at least ought rightfully to have been designed to constitute, a fund for partnership purposes, in order to warrant the bank to pay out to partnership checks.[5] If two distinct firms unite in their capacities as such to form a third, payment upon the check of either firm would be valid.[6]

§ 1615. *As to personal representatives and trustees.*— Where a deposit is made to the credit of several executors or administrators, the check of any one may be honored, for the reason that each one is competent in law to control the estate in hand.[7] But the rule respecting trustees is different. They act under a joint power, and the signature of all is, generally speaking, necessary to the validity of the check.[8]

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[1] Cook v. Seeley, 2 Exch. 749.

[2] Norton v. Seymour, 3 C. B. 792; Grant on Banking, 32; Morse, Id. 274.

[3] *Ex parte* Buckley, 14 Mees. & W. 469; overruling Hall v. Smith, 1 Barn. & C. 407.

[4] Williamson v. Johnson, 1 Barn. & C. 149.

[5] Sims v. Bond, 5 Barn. & Ad. 389.

[6] Duff v. East India Co. 15 Vesey, Jr. 198.

[7] Pond v. Underwood, 2 Lord Raym. 1210; Gaunt v. Taylor, 2 Hare, 413; *ex parte* Rigby, 19 Ves. 462; Allen v. Dundas, 3 T. R. 125; Can v. Read, 3 Atk. 695.

[8] Morse on Banking, 267.

But in an English case, where there were five trustees of a small trust fund, and they were widely apart from each other, the Court of Chancery ordered that payment might be made "to them, or any of them," to save expense.[1] In the event of the death of an executor, to whose credit a deposit stands, the bank should pay thereafter to the check of the *administrator de bonis non* of the estate of the prior deceased, and not that of his own personal representative.[2]

§ 1616. *In the case of deposits by corporations*, the bank should ascertain, by examination of the corporate charter and by-laws, what officers are competent to draw checks. If the corporation should furnish to the bank the name of the party authorized to draw checks, it would undoubtedly be justified in paying, and should pay, checks drawn by such party.[3] But otherwise, the check should purport on its face to be the corporate act. And in England, where three railroad directors were empowered to draw checks, and the three persons who were in fact directors signed their individual names to a check without styling themselves directors, it was held that the check did not sufficiently purport to be the check of the company, although it bore the impression of a stamp of the corporate name, and would not bind it even in the hands of a *bona fide* holder for value.[4] But in cases where the money has been paid out by the bank on such checks, if it can be traced to the corporation and proved to have been actually received by it, the bank will be entitled to charge the amount in account against the corporation.[5]

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[1] Shortbridge's Case, 12 Vesey, Jr. 28.

[2] Alleghany Bank's Appeal, 48 Penn. St. 328; Farmers', &c. Bank v. King, 57 Penn. St. 364.

[3] Fulton Bank v. N. Y. & Sharon Canal Co. 4 Paige, 127.

[4] Serrell v. Derbyshire R. R. Co. 9 C. B. 811; 19 L. J. C. P. 377.

[5] *In re* Norwich Town Co. 22 Beav. 143.

SECTION VI.

WHAT CHECKS SHOULD BE PAID BY THE BANK.

§ 1617. When a check is presented to the bank, all that the holder can require of the bank is its payment; he cannot require its certification or acceptance, for although the bank may consent to the holder's request to certify it, if it so pleases, it is by no means compellable to do so.[1]

But the holder has a right to demand payment on presentment of the check, and if a number of checks be presented during the day, it is the duty of the bank to pay them according to priority in the time of presentment at its counter, and not according to their priority in date. It has no right to distribute a fund *pro rata* amongst several check holders when it has not sufficient funds to pay all; nor has it a right to pay a check subsequently presented, to the exclusion of one previously presented.[2] The rule for it to follow is, "first come first served," and a departure from it renders it responsible to the first comer.[3] When a number of checks are presented at once, and their gross amount is beyond the funds of the drawer, it would seem that the bank is not bound to pay any of them;[4] but it has been said that in such a case, "if the bank choose to pay the first in date, it would be difficult to see on what ground either the drawer or the holders of the others could complain."[5] And it seems but right to let priority of date decide when there is no priority in presentment.

§ 1618. The bank should not pay the check save to the actual payee. If it mistakes his identity, it is responsible.[6] Neither should it pay it after notice of its loss or before its

[1] Bradford v. Fox, 39 Barb. 203; *ante*, § 1601.

[2] Matter of Brown, 2 Story, 502; 2 Parsons N. & B. 78; Morse on Banking, 248, 249.

[3] Morse on Banking, 248, 249.

[4] Dykers v. Leather Man. Bank, 11 Paige, 611.

[5] 2 Parsons N. & B. 78.

[6] Dodge v. National Exchange Bank, 30 Ohio St. 1.

maturity.[1] "Payment of the check by the bank before it is due will not be a discharge, unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid the check before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. In this case, although the holder had the legal title arising from the possession of the check, yet he was not *bona fide* the holder, with authority to collect, and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it."[2] The bank cannot charge the check against the depositor's account, unless it makes payment of it in the usual course of business. On this principle it was held, in Connecticut, that, where the plaintiffs who received the check from a third party payable to their order, indorsed it to the order of the bank cashier, enclosed it in an envelope, and sent it to the bank for deposit by a messenger whom they knew to be untrustworthy, and the latter removed the envelope, received payment of the bank, and then absconded with the amount,—the plaintiffs were entitled to recover the amount of the bank.[3]

§ 1618 *a*. The death of a drawer of a check, as is stated by many authorities, operates as a revocation of the authority of the bank or banker upon which it is drawn to pay it; and though it is conceded that if the bank or banker pay the check before notice of the death, the payment is valid,[4] otherwise, it has been considered, it is not.[5] This view has

[1] Godin v. Bank of Commonwealth, 6 Duer, 76; Morse on Banking, 260.

[2] Wheeler v. Gould, 20 Pick. 545; Shaw, C. J., citing Da Silva v. Fuller from Chitty on Bills.

[3] Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421. Phelps, J., and Foster, J., dissenting.

[4] Byles on Bills (Sharswood's ed.), 24; Chitty on Bills (13th Am. ed.), 429; 2 Parsons N. & B. 82.

[5] Ibid. Morse on Banking, 260, where it is said: "At the instant of his (the drawer's) death, the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his property."

been generally based upon the decision in the English case of Tate v. Hilbert,[1] where it was held that the gift of a common check on a banker payable to bearer was not a valid *donatio mortis causa*, or an appointment or disposition in the nature of it. It is quite true that authority to an agent is revoked as a general rule by death of the principal;[2] but this doctrine is qualified by the equally well settled principle, that if the authority be coupled with an interest in the thing vested in the agent, the death of the principal operates no revocation.[3] Now where a check is given to the payee for a valuable consideration (and the check imparts value), the authority to the payee to collect the amount from the bank, is coupled with a vested interest in the check. He can sue the drawer upon the check if it be dishonored.[4] The drawing of the check without funds to meet it is a fraud,[5] and the English case above referred to does not determine, as has been supposed, that when the check is given for value, the authority of the banker to pay it is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it,[6] and we can discern no principle of law which allows the death of the drawer to affect the rights of a check holder who has given value for it.[7] The idea that the death of the drawer of a check given to the payee for value, operates a revocation, is, as it seems to us, a total misconception of the law. For a check is a negotiable instrument as often, if not more frequently, given for value, than any other species of commercial paper. The

[1] 2 Vesey, Jr. 118 (1793); 4 Brown Ch. Cas. 286; Chitty, Jr., on Bills, 510.

[2] Story on Agency, § 488.

[3] Story on Agency, §§ 488, 489.

[4] *Ante*, §§ 1587, 1588, 1589.

[5] § 1596 *et seq.*

[6] See *ante*, § 498; Chitty on Bills, 282, 287; Cutts v. Perkins, 12 Mass. 206; Edwards on Bills, 454; 2 Parsons N. & B. 287.

[7] In Thomson on Bills, 244, it is said: "It has been held in England that a check on a banker is revoked by the grantor's death, so that payment of it by the banker will not be good unless it is made before he hears of the drawer's death. It seems to be considered as a kind of mandate. In Scotland, such a check, being an assignment of the funds in the banker's hands, might be completed by presentment to him even after the drawer's death." Morse, 260.

drawer is deemed the principal debtor;[1] and it is anomalous to hold that his death in anywise lessens his obligations, or the right of the bank to pay it, when given for value.[2]

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[1] *Ante*, § 1587, and cases cited.

[2] Burke v. Bishop, 27 La. An. 465 (1875); 21 Am. Rep. 567, seems to sustain these views, though it was declared, as is conceded: "If it had been a check drawn by Hampton Elliott, and he had died before it was presented, and the check was a donation, the check would have been worthless, because by demise of the donor, his mandate to his agent, the bank, was revoked."

In an article published in the Bankers' Magazine of New York city, for February, 1879, p. 619, the author has amplified the views which are here presented in the text; and from that article the following extract is made:

"It is an entire misconception of the nature of a check, as we think, to look upon it as a mere mandate. It imports that the payee has given value for the right to draw the funds from the banker, and to hold that it is a mere mandate to the banker to pay the amount it calls for, is to lose sight of its higher and more comprehensive character, that of a negotiable instrument, employed as a necessary instrument of commerce, circulating from hand to hand almost as freely as money; and is to allow the greater to be swallowed up in the less.

"If it is to be regarded as an authority to the banker to pay the amount, it ought also to be regarded as an authority to the payee, or other holder, to receive the amount. Being presumably given to the payee for value, the authority to him to receive the amount is presumably an authority coupled with an interest. Then it is a double mandate. In so far as it is an authority coupled with an interest, it is irrevocable. No citation of authority is needful for this universally recognized doctrine. If the banker's authority to pay be revoked by the drawer's death, we are driven to this paradoxical conclusion: that an authority coupled with an interest may be practically revoked and annulled by the revocation of another authority not coupled with an interest; and the law would appear in this state of self-stultification that the authority to collect the amount continues, and is irrevocable, while the authority to pay, which is necessary to its exercise, ceases by revocation! Is not this *reductio ad absurdum?*

"According to the view which we have elsewhere taken of a check, it operates as an assignment of the fund upon which it is drawn, as between the drawer and the payee, or holder, and the assignment binds the bank as soon as it is notified thereof by the presentment of the check. See Daniel on Negotiable Instruments, § 1643. But we acknowledge that this is not the predominant view and that the numerical weight of authority is against it. Be this as it may, it is universally conceded that the check operates as an assignment of the fund *pro tanto*, as soon as the bank consents to it by certification or payment.

"This being the case—the assignment depending not upon the drawer who has by the act of drawing given his consent, and not upon the act of the banker—we cannot see how the death of the party who has consented can annul the right of another to acquiesce and concur in his act.

"Professor Parsons, in a note to his text, takes this view. Says he: 'The right on the part of the drawee to complete the assignment would seem to be a privilege of his own, and it is somewhat difficult to see how the death of the drawer can affect it. The drawer has given the holder a written instrument authorizing the latter to apply to the drawee for the assignment of certain funds. The holder of the bill who has received it for a sufficient consideration has an interest in this authority—not merely in the proceeds of the bill, but in the bill itself; and the rule is that an authority coupled with an interest, is irrevocable.' 2 Parsons N. & B. 287, note. This language is used in respect to an ordinary bill; but the author evidently regards it as equally applicable to a check.

"We concede that if the check were a gift to the payee, and the banker knew that fact, the death of the drawer would operate as a revocation of the banker's authority to pay it. In such a case the authority to the donee to collect, as well as that of the banker to pay, is not coupled with such an interest as to continue them in force. 'If it had been a check drawn by Hampton Elliott, and he had died before the check was presented, and

§ 1619. If the bank is not in funds to pay the check at the time it is presented, it should at once refuse payment. If there is a doubt whether or not it is in funds, the bank may take time to examine or run up its account in order to ascertain, but it should be careful not to detain the check an unreasonable time. It has been held that, according to the usage of trade, a check drawn on a banker in the city of London, "may be retained by the banker on whom it is

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the check was a donation, the check would have been worthless, because, by the demise of the donor, his mandate to his agent, the bank, was revoked,' is the language of the Supreme Court of Louisiana, in Burke v. Bishop, 27 La. An. 465 (1875). In such a case all that is said in Tate v. Hilbert would apply. But the banker is not to presume that a check is a donation. To require such a presumption on his part, is to make him presume what in ninety-nine cases out of a hundred is not the fact, is to make him presume contrary to what a purchaser may presume; is to except a check from the universally accepted rule of the law merchant that negotiable instruments import value; and is to attach one presumption to the check while the drawer is alive, and another to the same paper upon his demise.

"In the case of Cutts v. Perkins, 12 Mass. 206, a master of a ship in London bound to the U. S., having goods on board consigned to a Boston merchant, and being indebted to a London merchant, drew a bill on the consignee in favor of the London merchant for the amount of the freight money. Before the bill was presented the master died, and it was contended that his death operated as a revocation of the bill. Putnam, J., delivering the opinion of the court, said: 'Upon the delivery of a bill of exchange to the payee the liability of the drawer becomes complete. Some writers have holden that where the indorsement was intended as a mere authority to enable one to receive the money for the use of the indorser, the death of the indorser should operate as a revocation of the authority. But the law is clearly otherwise, when the authority is coupled with an interest, and in such case the death of the drawer will not be a revocation of the request on the drawee to accept.'

"This case, as we think, correctly states the law. If the death of the drawer revokes the drawee's right to accept and pay the bill, then an indorser's death must also revoke it, for he is regarded as a new drawer, and thus confusion and uncertainty are introduced into the law merchant in respect to instruments which of all others should be most sure and stable.

"In Billing v. De Vaux, 3 Man & Gr. 565, a bill drawn in favor of the plaintiffs was accepted by letter after the drawer's death. The payee sued the acceptor, and he was held liable. Tindal, C. J., said: 'I am not aware of any principle of law by which, upon the death of the drawer of the bill, the right and liabilities of the parties thereto were at all varied.' Coltman, J., said: 'The other circumstance relied on is that Mersing, the drawer, was dead at the time the letter was written to him, and therefore that it is to be considered as mere waste paper. Possibly that might be the case were its effects confined to the parties themselves. But here the bill had been put in circulation.' The bill was in the hands of the payee.

"Maule, J., said: 'The letter (of acceptance) operates for the benefit of Mersing's (the drawer's) estate, for his death could not vary the rights and liabilities of third parties.'

"We think this case direct authority as against the inferences which have been drawn from Tate v. Hilbert. Rights accrue upon the delivery of a bill or check to the payee. They are not varied by the subsequent death of the drawer. The drawee of the bill may accept and pay it; the drawee of the check may also honor it; for it is presumably given for consideration, and its payment operates for the benefit of the estate of the deceased, which, upon its dishonor, would be bound for its payment out of general assets.

"It is to be hoped that the erroneous doctrines of the text-writers may soon be brushed away, and that the clear principles which apply to this important question may be universally recognized and adopted."

drawn until five o'clock P. M., of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that too although it has been in the first instance canceled by mistake, as intended to be honored."[1] This privilege of retention of checks until five o'clock is applicable by custom only to the city of London; but it has been held in the United States that a bank might return a check at any time within twenty-four hours, on discovering that there were no funds to meet it, without being estopped by its detention for that period from showing that fact.[2]

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[1] Morse on Banking, 251.

[2] Overman v. Hoboken City Bank, 31 N. J. L. R. (2 Vroom.) 563. In this case the check was presented to the Hoboken City Bank between twelve and one o'clock on October 31st. On the following day, about twelve o'clock, noon, that bank returned it to the Ocean Bank, from which it was received, marked "not good." It was held that the retention of the check for this period, a little less than twenty-four hours, was not implied acceptance, and created no obligation on the Hoboken Bank to pay it. Beasley, C. J., saying: "There can be no doubt that the drawee of a bill of exchange or check can so deal with it that, although he make no express acceptance, the law, with an eye to the public interest, will infer an acceptance on his part. Thus, if such drawee were to return the bill in his possession contrary to the usual mode of intercourse between himself and the holder, and under such circumstances as to induce a reasonable belief that it had been honored, such conduct might amount in law to a constructive acceptance. But no case was cited upon the argument, and none has been found in which it was ruled that a mere retention of the bill by the drawee, such retention being unqualified by any adventitious circumstance, such as a usage of trade, or an understood mode of intercourse between the parties, will, by intendment of law, be considered equivalent to an acceptance of such bill. Treating the subject on principle, we must arrive at the opposite result. It is the business of the holder of the bill of exchange or check to present it for acceptance or payment. Upon such presentation, the drawee has a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand; and it has been said that such reasonable time is the space of twenty-four hours (Bellasis v. Hester, 1 Ld. Raym. 280). After the lapse of this reasonable time, whatever period that may be, the holder of the bill has a right to know whether the bill is accepted or dishonored. But it is his duty to wait upon the drawee to ascertain this. If, therefore, in the ordinary course of commercial business, a holder of a bill leave it with the drawee, or send it to him by mail, and such holder do not, after the efflux of a reasonable time, call for such bill, so as to ascertain whether it has been accepted or not, there is nothing in such a transaction upon which to raise or imply an engagement to accept, or a contract of acceptance. In the same manner, if a check, instead of being presented at the counter of a bank by

§ 1620. *In the next place, as to part payment of checks.*— If the bank refuses to pay the check in full, the holder is clearly not bound to receive part payment thereof; for he has an order for so much money, and any less amount fails to meet its demands. And, on the other hand, it is frequently said, that a bank not having full funds to pay the check, is not bound to pay it in part, as it is entitled to possession of the check as its voucher against the drawer for payment.[1] Whether, indeed, it would be justified in making part payment, if so inclined to do, has been questioned, and a late writer has observed that "the better rule, perhaps, would be,

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the holder or his agent, should be forwarded by mail, such bank, it is conceived, in the absence of any established course of dealing between itself and such holder, would be under no obligation to return such check, but could safely wait in silence the further action of such holder. In the case of Jeune v. Ward, 2 Stark. 326, the bill had been retained by the drawee over a month, and Lord Ellenborough, at Nisi Prius, had permitted a recovery as on an acceptance, having put the case to the jury on the broad ground that it was the duty of the drawee to retura the bill to the holder. But the Court of King's Bench, considering this a misdirection, granted a new trial, and Mr. Justice Bayley, in his opinion delivered on that occasion, thus expresses his view of the law: 'Where a bill of exchange is left for acceptance in the ordinary course of commercial transactions, it is the duty of the party to call for it within a reasonable time, in order to ascertain whether it has been accepted or not, unless, as in one of the cases cited, some other and peculiar course of dealing has been established between the parties.' The same rule is laid down by Chitty in these words: 'But it would seem that the mere detention of a bill for an unreasonable time by the drawee will not amount to an acceptance, although the drawee disfigure, cancel, or destroy the bill. And, by the usage of trade in London, a check may be retained by a banker on whom it was drawn, till five o'clock in the afternoon of the day on which it is presented for payment, and then returned, though it has been previously canceled by mistake. And constructive acceptances ought to be watched with the utmost care, for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract; but it is laying down a very loose and dangerous rule when any degree of latitude is given to these constructive acceptances. The cases which have been determined in favor of these constructive acceptances have all been decided on very special circumstances' (Chitty on Bills, 175). Equally clear and explicit is the language of Prof. Parsons. He says: 'We think, however, both on authority and reason, that mere detention or delay should not, of itself and alone, be considered as the equivalent of acceptance'" (2 Pars. on Bills and Notes, 284). See § 492, vol. 1.

[1] Matter of Brown, 2 Story, 502; St. John v. Homans, 8 Mo. 382; Murray v. Judah, 6 Cow. 490.

to save misunderstandings and complications, that if a bank cannot pay in full, it not only may not, but must not pay at all."[1]

It is quite clear, we think, that unless the holder will surrender the check, the bank is not obliged to pay it in part, for it is entitled to the check as a voucher. But if the holder offers to give up the check on receiving part payment, we cannot perceive that the bank would be warranted in refusing such part payment; and so, likewise, if the holder would place a sufficient sum to the drawer's credit, to make the check good before drawing out the amount. This view is sustained in a well considered *nisi prius* case,[2] and was previously intimated by Professor Parsons, at least to the extent that the drawer would have no right to complain of the part payment.[3] Therefore, we should say, as the holder consents, the bank would have no right to refuse it.

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[1] Morse on Banking, 257. The author continues: "The drawer has not requested the bank to make a part payment. He has demanded that it do a certain act, to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order expressed without alternative to pay that specific sum."

[2] Bromley v. Commercial National Bank (Court of Common Pleas of Philadelphia), reported in American Law Times for November and December, 1872, vol. V, p. 219. In this *nisi prius* case it appeared that the payee of a check for $725 presented it to the bank for payment. The teller, when about to pay it, discovered that there was but $229 92 to the drawer's credit. The payee then demanded the payment of this balance to him, which the bank refused. The plaintiff then offered to deposit to the drawer's credit a sufficient sum to make the check good, if the bank would then pay it. This it also refused. The court held that the payee was entitled to the balance in the bank.

[3] 2 Parsons N. & B. 78, 79. In 1 Parsons N. & B. 552, it is said: "In our chapter on Checks we consider the law of presentment in regard to them; here we will only say, that the exception should be construed more liberally with regard to checks, at least where the check is drawn on a public banking corporation. These corporations do not receive goods on consignment, therefore there can be no reason to expect that the check will be honored on any such grounds as this. There would seem to be scarcely any reasonable grounds to expect payment, and consequently any right to draw a check, unless the bank had sufficient funds to pay it." In a note subjoined to the foregoing observations, the learned

§ 1621. *In the fourth place, as to what is payment by the bank.*—Where a check drawn upon a bank is presented to it by the holder, for deposit to his credit, and the amount is credited to the holder, the legal effect is precisely the same as though the money were first paid out to him, and then by him deposited in the bank. It is the right of the bank to refuse to pay it, or it may reject it conditionally.[1] But if it accepts the check as valid, and pays out the money (or, what, as some authorities hold, is the same thing, credits it to the holder's account), it cannot at any time thereafter, even on the same day, return the check on discovering that there were no funds to meet it, and cancel the transaction,[2] for the collection is then treated as accomplished.

But if the check holder merely requested the check to be placed to his account, and the bank does not debit the drawer, or credit the holder with the amount, or cancel the check, it may return the check on discovering that it was an

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author adds: "We are not aware of any authority for this. In Edwards v. Moses, 2 Nott & McC. 433, all the facts that appeared were, at the time when the check should have been presented, the drawer had withdrawn all his funds. Richardson, J., said that it was a mere case of overdrawing, and due presentment and notice were held necessary. But we doubt the authority of this case. In Cruger v. Armstrong, 3 Johns. Cas. 5, the check was drawn for $2,500. On the day of its date the bank paid out checks of the drawer to the amount of $3,500, and at the close of banking hours a balance was left of $400. Presentment was held necessary—Lewis, C. J., dissenting. The authority of this case may be somewhat doubtful. Radcliffe, J., said that presentment was necessary, though notice might not have been, and founds his opinion on this, which is clearly incorrect. Kent, J., said: 'In the present case there is no such demand proved, nor is there anything in this case to take it out of the general rule. It cannot be considered as a check fraudulently drawn without effects in the hands of the banker. The presumption is, that the check would have been paid if diligently presented; at least, there is not sufficient evidence to justify a resort to the drawer without having made the experiment.' The answer to this may perhaps be, that the drawer is bound to know what his balance in bank is, and, as the holder is not bound to present a check in any case until the next day, and as there were checks outstanding, the amount of which added to that of the check in suit exceeded his balance, the presumption of payment would have been slight."

[1] Pratt v. Foote, 9 N. Y. 463; Oddie v. National City Bank, 45 N. Y. 735; Morse on Banking, 320, 321.

[2] Oddie v. National City Bank, 45 N. Y. 735 (1871). See Irving Bank v. Wetherald, 36 N. Y. 337.

overdraft, provided it does so in time to give the holder due notice of dishonor. "If," says Lord Denman, C. J., in an English case, "If on delivering the check, he (the holder) had said at once, 'cash on this check,' or 'give me credit for it,' he must have drawn from Reader (the bank clerk) a distinct answer; but by merely saying, 'place this to my account,' he leaves it upon the usual terms, and subject to the contingencies to which bills or checks so paid in are liable; and if he received notice of dishonor in proper time, it was sufficient." [1]

§ 1622. Mr. Morse observes that "if the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it on the depositor's bank book, thus treating it in every respect as if it were a check upon any other bank instead of upon itself, these facts do not create a payment or render the bank liable for the amount to the depositor. The officers, having dealt with the check in the ordinary form have placed the bank only under the ordinary obligation, to wit, that of collecting the check in due course of business for the benefit of the depositor." [2] In California it is considered that if the depositor hands the bank officer a check on another bank, and it is credited on his bank book, it is to be regarded as received for collection, and if not paid may be returned and canceled; and that the same rule applies even though the check be on the same bank where the depositor has it credited on his account.[3]

SECTION VII.

PAYMENTS BY CHECKS.

§ 1623. *In respect to payment by checks*, a creditor may, if he pleases, accept a check in absolute discharge of the

[1] Boyd v. Emmerson, 2 Ad. & El. 184. See Oddie v. Nat. Bank, *supra*.

[2] See Morse on Banking, 320. See *post*, § 1623.

[3] Nat. Gold Bank v. McDonald, 51 Cal. 65.

debt; but where a check is received by the creditor, there is no presumption that he takes it in payment, but, on the contrary, the implication is that it is only to be regarded as payment if cashed.[1] And so strong is this implication, the check being presumptively drawn upon a fund deposited to meet it, that more evidence is required to prove that a check given to take up a note is received in satisfaction and discharge than is demanded when one note is given for another.[2] Certainly the holder of a bill or note is not bound to give it up on receipt of a check until the latter is paid.[3] In Massachusetts, the law on this subject has been well expressed, the Court saying: "A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not depends upon two facts: *first*, that the drawer has funds to his credit in the bank on which it is drawn; and *second*, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered. But if the party receiving it is guilty of laches in presenting it, and the bank in the meantime suspends payment, he thereby makes it his own, and it shall operate as payment of his debt, the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."[4] In Virginia, the Supreme Court of Ap-

[1] Currie v. Misa L. R. 10 Exch. 153 (1875); 12 Moak Eng. R. 592; The People v. Baker, 20 Wend. 602; Small v. Franklin Mining Co. 99 Mass. 277; Ocean Tow Boat Co. v. Ship Ophelia, 11 La. Ann. 28; Smith v. Miller, 43 N. Y. 171; (1870) 52 N. Y. 546 (1873); Bradford v. Fox, 38 N. Y. 289; Sweet v. Titus, 11 N. Y. S. C. (4 Hun), 639; Davison v. City Bank, 57 N. Y. 82; Phillips v. Bullard, 58 Ga. 256; Everett v. Collins, 2 Camp. 515; Tapley v. Marstens, 8 T. R. 451; Heartt v. Rhodes, 66 Ill. 351. Check may by agreement be taken as absolute payment, and whether so taken or not is question of fact for the jury. Blair & Hoge v. Wilson, 28 Grat. 165.

[2] Olcott v. Rathbone, 5 Wend. 590; 2 Parsons N. & B. 86.

[3] The People v. Baker, 20 Wend. 602; Barnet v. Smith, 10 Fost. 256; Hansard v. Robinson, 7 B. & C. 90; Moore v. Barthrop, 1 B. & C. 5; Pearce v. Davis, 1 Moody & R. 365; Ward v. Evans, 12 Mod. 521.

[4] Taylor v. Williams, 11 Metc. 44; Sweet v. Titus, 11 N. Y. S. C. (4 Hun), 639.

peals says, Burks, J., giving the opinion: "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished unless and until the check be paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained."[1] When checks deposited with a bank, and credited in the depositor's pass book are taken, in the absence of any special agreement, they are deemed to be taken for collection, and not as cash. They may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another.[2]

§ 1624. It is frequently the case that a bank or other agent for collection of a bill or note receives the check of a debtor and surrenders up the bill or note to him. This practice was sustained in an English case, where it was held that a banker in London, to whom bills of exchange had been sent for collection, was not guilty of negligence toward his correspondent in surrendering them up on receipt of checks drawn upon a banker in London, though the checks were dishonored for want of funds. This decision was based upon the ordinary course of trade and business of bankers.[3] But Mr. Chitty observes: "That doctrine may now be questionable, and most of the London bankers, on presenting a bill for payment in the morning, leave a ticket where it lies due, and declaring that 'in consequence of great injury having arisen from the non-payment of drafts taken for bills, no drafts can in future be received for bills, but that the parties may address them for payment to their bankers, or attach a draft to the bill when presented.'"[4]

[1] Blair & Hoge v. Wilson, 28 Grat. 171 (1877).

[2] National Gold Bank, &c. v. McDonald, 51 Cal. 64 (1875); Morse on Banks, 320, 321.

[3] Russell v. Hankey, 6 T. R. 12 (1794).

[4] Chitty on Bills (13th Am. ed.) [*369], 415.

And Mr. Byles considers that the practice is no longer usual in London, and doubts if it would be protected.[1]

§ 1625. In the United States, it is quite certain that a banker or other agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that if the debtor did not pay the amount in money, and the drawer or indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent. If, indeed, on the same day that the bill or note was due, the agent received a check for the amount and delivered up the bill or note, but on presentment of the check at the bank, and refusal of payment that very day it had been returned, the bill or note reclaimed and protested, and the drawer or indorsers duly notified, then no right would be forfeited, but the liability of all preserved.[2] But if the agent neglected to present the check until the next day, it would then be too late to preserve recource against the drawer, if a foreign bill, by making protest; and if in the meantime the bank had failed, the loss would fall upon the agent. And in New York, the Court of Appeals would seem to have gone further than this, and to hold that in all cases the agent must present the check on the very day he receives it, or he would be liable for any resulting loss. This seems to us the correct doctrine, for the agent exceeds authority in taking the check, and therefore acts at his peril.[3] And while it may be, and

[1] Byles (Sharswood's ed.) [*24], 100.

[2] Turner v. Bank of Fox Lake, 3 Keyes, 425; Smith v. Miller, 43 N. Y. 171.

[3] Smith v. Miller, 43 N. Y. 171 (1870), Allen, J., saying: "If the check were worthless when given, or became worthless before it could have been, with reasonable diligence, presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiffs had omitted to notify them in due time of the non-payment of the bill. There would, in such case, be no loss resulting from negligence. * * * When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment. If a custom can exist in law, and does exist in fact, authorizing such delay at the

as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice, on the part of the principal, falls far short of a usage which would permit the agent to do likewise.[1]

§ 1626. It not infrequently happens that a depositor intending to offer his checks to creditors, procures their certification by the bank before he delivers them to the payees; and the questions then arise whether or not such certified checks, when taken for debts, are to be regarded as so much cash taken in absolute payment, or are, notwithstanding the certificate of the bank, still mere checks, with the usual characteristics of such instruments; and whether or not the holder must exercise any extraordinary diligence in presenting them. Both upon reason and authority, it may be stated, that although it be the fact that certified checks pass from hand to hand, as cash, they are not cash, or currency, in the legal sense of those terms, but they do not lose, by the fact that they are certified when delivered, any of the characteristics which attach to uncertified checks; nor do they impose any greater diligence upon the holder, who has the same time in which to present them as if they were uncertified.[2]

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risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence.

"The undisputed evidence in this case shows a practice, if not inconsistent with the existence of any such custom, at least more in harmony with the relative rights and obligations of the parties as recognized by law; and which, had it been adopted by the plaintiffs, would have prevented all loss. The proof is, that the account of the drawers of the check was good at the bank during all business hours of the day on which it was drawn; that the amount to their credit, and subject to their draft, was more than sufficient to pay all outstanding checks; and if this check had been presented, it would have been paid, or certified as good, which would have been equivalent to payment. The plaintiffs had two full hours for presenting the check. * * * It was the duty of the plaintiffs to present the check at the bank at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested for non-payment; and not having done so they were chargeable with negligence and the consequent loss." See s. c. 52 N. Y. 546 (1873).

[1] Whitney v. Esson, 99 Mass. 110.

[2] Bickford v. First Nat. Bank, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497.

§ 1627. The only effect of the certification of the check is to give it additional currency, by carrying with it the evidence that it was drawn in good faith, on funds to meet its payment, and lending to it the credit of the bank in addition to the credit of the drawer. Beyond this it does not differ from an uncertified check, nor does it make any difference whether the drawer is actually charged on the books of the bank or not with the amount of the check when it is certified as "good." According to general usage the bank, when it makes such certificate, expects to pay the check out of the drawer's funds in its hands, and makes some memorandum, or takes some other course, by which it will not permit the amount necessary to meet the check to be anticipated; and this both drawer and payee understand. So the practical effect of certifying the check is the same, whether the drawer is actually charged on the books or not, as in either case that amount of his funds is withdrawn from his control until the payment of the check is refused.[1]

§ 1628. A bank upon which a check is drawn, it has been held, cannot plead as offset, an amount due the holder of the check against him, because a check is only conditional payment, the holder being the mere agent of the drawer to procure the money which is demanded by the check, and to apply the same when received in payment of the debt due by the drawer to him.[2] Especially does this rule apply when the holder of the check is to receive the amount for the benefit of another. Vast amounts of property are sold by agents, brokers, and commission men for their principals, and it would be unreasonable and unjust when they received a check, as the means of procuring the money of their principals, to permit the bank to set off an amount due by them individually.[3]

[1] Brown v. Leckie, 43 Ill. 501.

[2] Brown v. Leckie, 43 Ill. 501.

[3] Brown v. Leckie, 43 Ill. 501.

SECTION VIII.

OVER-CHECKS.

§ 1629. We have already seen that it is a fraud for a person to draw a check upon a bank when he has no funds on deposit to meet it.[1] It is in effect a representation to the payee that there are funds to meet it, and the holder is deceived and misled if such be not the case. But further than this, the overchecking a deposit has been regarded as a most improper act on the part of the depositor, and even fraudulent, unless done by arrangement with the bank; for its officers, naturally relying on the good faith of their customer, are apt to pay his check without scrutiny, and the bank may thus be defrauded of its money.[2] Certainly it is a bad practice to overdraw, and one that should not be tolerated; but it is too severe to regard an over-check as in all cases *prima facie* a fraud and imposture in a criminal point of view.

§ 1630. It is undoubtedly in the power of the bank to authorize over-checks, or checks without any funds whatever, upon negotiations with the drawer. Such dealing would be in the nature of a loan. And the bank would be bound, if the arrangement were consummated upon a legal contract. But mere permission to overdraw, not communicated to the check holder, would certainly be of no avail in legal effect. And such permission would not warrant a drawer in stating absolutely, solely on the faith thereof, that his check was "good."[3] The officers of the bank should be careful to pay no over-check without distinct authority from the bank; for such over-check would be chargeable against them, and its payment would be a grave departure from official duty. And no payee or holder should receive a check, knowing that the drawer had no funds to meet it, as he would thus join in an

[1] See *ante*, § 1596.

[2] True v. Thomas, 16 Me. 36; Morse on Banking, 318.

[3] Ballard v. Fuller, 32 Barb. 68.

attempt to mislead the bank; and if he got the money on such a check he could be compelled by suit to return it.[1]

SECTION IX.

CANCELED, DISHONORED AND STALE CHECKS.

§ 1631. When a check is presented to a bank for payment, or is offered in a business transaction, the bank or the party negotiating for it should examine it carefully and observe whether or not it bears upon it any marks indicating that it has been canceled, or has grown stale. And the party to whom the holder offers to transfer it, should observe whether or not there are any marks of dishonor about it. For if the check bears upon it indications that it has been canceled—as, for instance, if it appears to have been torn to pieces and pasted together—the bank will be liable to the drawer, if it turn out that it had been canceled by the drawer, as its appearance was sufficient to excite its suspicions, and to have led to a refusal of payment.[2] So if the check bear marks of its dishonor, a transferee would be entitled to stand in no better position than his transferrer, as it would then have (like any other negotiable instrument so marred) "a death wound apparent on it."[3]

§ 1632. A check is payable instantly on demand; and as heretofore set forth it should be presented within a day when the payee receives it in the place where drawn, and forwarded by the next day, when forwarding is necessary, in order to preserve the payee's recourse against the drawer, in the event of a failure of the bank.[4] But if the bank remains solvent the holder may retain the check as long as he pleases, and hold the drawer liable until the time for suit is ended by the statute of limitations.[5] But the payee acts unwisely

[1] Martin v. Morgan, Gow, 123; 1 B. & B. 289; 3 Moore, 635, s. c. Byles (Sharswood's ed.) [*16], 88; Morse on Banking, 254.

[2] Scholey v. Ramsbottom, 2 Camp. 185.

[3] See Goodman v. Harvey, 4 Ad. & El. 870; §§ 724, 732, 788, vol. 1.

[4] See *ante*, §§ 1590, *et seq.*

[5] Thomson on Bills, 118.

if he delays to present a check, as the bank and the drawer may both fail. And it is not advisable for a bank to pay a check which has been long outstanding, or for any one to receive it by transfer, without inquiry. For while age cannot invalidate a good check (unless the limitation has applied), the lapse of a long period from its date before its payment, is a circumstance so out of the ordinary course of business that it ought to arouse suspicions and excite inquiry. And the bank paying, or the party receiving such a check, acts at his peril.

§ 1633. No precise period of time can be specified at which a check would be deemed so stale as to subject the receiver to equitable defenses, or a bank to loss, in the event that such defenses arose, or the liability of the drawer had ceased. In Pennsylvania, where at the time the check was drawn the drawer had no effects in the bank, nor provided any afterward, and a year and a day after the day named for payment it was presented to and paid by the bank, and it appeared that the debt was discharged by the drawer after the check was drawn, it was held that the circumstance of its age was sufficient "to put the bank on inquiry," and its negligence precluded it from relief against the drawer.[1] So the lapse of two and a half years, especially when the check contained a mark indicating that it was a memorandum check, has been held to open the check to equities.[2] And in another case, the lapse of five months.[3] In an English case, where the owner lost a check, and it was paid five days after its date to a shopkeeper by the bank, it was held that the shopkeeper should refund to the true owner, having taken the check overdue, unless, indeed, he were protected by the title of his assignor, and the burden of proof to that effect lay on him. Holroyd, J., said: "A check is payable immediately, the holder of it takes it at his peril, and a person taking it after it is due takes it also at his peril."[4]

[1] Lancaster Bank v. Woodward, 18 Penn. St. 357.

[2] Skillman v. Titus, 32 New Jersey L. R. (3 Vroom), 96.

[3] First Nat. Bank v. Needham, 29 Iowa, 249 (1870).

[4] Down v. Halling, 4 B. & C. 330 (17 E. C. L. R.); 6 D. & R. 445; 2 C. & P. 11.

§ 1634. On the other hand, the fact that the holder received the check one day,[1] four days,[2] six days,[3] or ten days,[4] or nearly a month[5] after date has been considered insufficient to subject him to equitable defenses, though taken in connection with other circumstances, its being somewhat stale might be evidence of bad faith.[6] And if by the drawer's fault the bank pays an altered, forged, or otherwise invalid check, the bank will not be liable to him.[7] And where the drawer himself delayed nine months to issue the check, he could not object against the holder who received it from him the circumstance of its staleness.[8] Without any circumstances of this kind arising, the certain age at which a check may be said to be stale is as uncertain as the fixing of the day on which a young lady becomes an old maid. Mr. Morse says that its age "must be something so extraordinary as to be inconsistent with the ordinary course of business in order to give the bank the right to demand delay."[9] Another writer regards a check as "never overdue,"[10] but this is going too far.

A declaration by the drawer of a check before maturity that it would not be paid, would excuse want of presentment or notice,[11] and a part payment before maturity would

[1] Himmelman v. Hotaling, 40 Cal. 111.

[2] First Nat. Bank v. Harris, 108 Mass. 514. In this case, "a check on a bank in Boston was sent from Boston by mail to Rochester, in New York, and there bought four days after its date, and was presented for payment two days afterward. *Held*, that the buyer was not subject to equities existing between the original parties, of which he had no notice, either on the ground that the lapse of time between the date of the check and his purchase of it should have put him upon inquiry, or on the ground of unreasonable delay in making presentment."

[3] Rothschild v. Corney, 9 B. & C. 388.

[4] Ames v. Meriam, 98 Mass. 294, the Court saying: "A holder who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues."

[5] Lester v. Given, 8 Bush (Ky.), 357.

[6] Bank of Bengal v. Fagan, 7 Moore P. C. 72.

[7] Lickbarrow v. Mason, 2 T. R. 63.

[8] Boehm v. Sterling, 7 T. R. 423.

[9] Morse on Banking, 264.

[10] Thomson on Bills, 118.

[11] Minturn v. Fisher, 7 Cal. 573.

waive the necessity of presentment and notice, as it would be the presumed intention of the parties that it should not be presented.[1]

SECTION X.

RIGHT OF HOLDER OF UNCERTIFIED CHECKS TO SUE THE BANK.

§ 1635. The question whether or not the holder of a check may sue the bank holding funds of the drawer, upon its refusal to pay it, has divided the opinions of courts and jurists, and no little perplexed the legal profession. And it has been observed by a discriminating writer, that "when one comes to examine the authorities which range themselves on either side, and to investigate the chains of reasoning by which these authorities respectively seek to support themselves, the tale of the two honorable knights who fought about the question of whether the shield between them was golden or silvern, is forcibly brought to mind. Each line of argument in its turn seems the more correct and the more satisfactorily backed by respectable vouchers."[2] But this writer concludes that the weight of authority is in favor of the check holder's right of action, and expresses his own judgment to the like effect.[3] We shall first review the authorities, and then state our own conclusions.

§ 1636. There are a series of cases in which it is declared that the check holder cannot sue the bank unless the check has been certified, or otherwise accepted; cases, however, in which no question respecting checks was presented, the instrument in suit being either an order or a bill of exchange. These cases are often cited in support of the proposition that the check holder cannot sue the bank without acceptance; but really they are not authority for that doctrine, as a check is necessarily drawn upon a bank, and differs from an order or a bill of exchange, which need not be.[4] There are also

[1] Levy v. Peters, 9 Sergt. & R. 125.

[2] Morse on Banking, 459.

[3] Id 473.

[4] Mandeville v. Welch, 5 Wheat. 277 (case of a bill of exchange); Cow-

some cases in which the opinion has been expressed, or the decision has been pertinently made to the like effect that the check holder cannot sue the bank. They proceed upon the ground that there is no privity of contract between the holder of the check and the bank, unless the latter does some act by which it is created; that while it may be an appropriation of the fund, in whole or in part, as between the drawer and the holder, until the bank consents to it, it is in nowise bound to pay the amount to the holder; that especially is this the case when the check is for part of a deposit, as one cause of action might thus be split up into many; and that the only remedy which exists for a wrongful refusal of the bank to pay the amount deposited to meet the check, is a suit by the drawer, or the holder in tort for the wrong done; or suit by the drawer for damages for breach of the implied contract to pay it.[1] The Supreme Court of the United States has unanimously adopted this view,[2] but it has qualified its opinion by remarking: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and

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perthwaite v. Sheffield, 3 Coms. 243 (1850) (bill of exchange); New York Bank v. Gibson, 5 Duer, 574 (1856) (bill of exchange); Grinnell v. Suydam, 3 Sandf. 133 (bill of exchange); Luff v. Pope, 5 Hill, 413 (order on individual—not a bank); Dana v. Third Nat. Bank, 13 Allen, 445 (bill of exchange).

[1] Bank of Republic v. Millard, 10 Wall. 152 (1869); Chapman v. White, 2 Seld. 412 (1852). The instrument in suit was called a bill, but was really a regular check drawn by one bank upon another. Carr v. Nat. Security Bank, 107 Mass. 45 (1871); Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82 (1871); Van Alen v. American Nat. Bank, 52 N. Y. 4 (1873); Duncan v. Berlin, 60 N. Y. 151 (1875); Tyler v. Gould, 48 N. Y. 682; Planters' Bank v. Merrit, 7 Heisk. 117; Planters' Bank v. Kesee, Id. 200; Moses v. Franklin Bank, 34 Md. 580 (1871), Alvey, J.: "It is certainly a general rule that the drawee who refuses to accept a bill of exchange cannot be held liable on the bill itself; nor to the holder for the refusal, except it be upon the ground of fraud and loss to the latter. A bank upon which a check is drawn occupies in this respect a similar position to that of a drawee of a bill of exchange. It is but the agent of the depositor, holding his funds upon an implied contract to honor and take up his checks to the extent of the funds deposited. The obligation of the bank to accept and pay is not to the holder, but to the drawer." Bellamy v. Majoribanks, 8 E. L. & Eq. 523 (1851), Parke, B.; Purcell v. Allemong, 22 Grat. 742 (1872), Anderson, J., obiter; 2 Parsons N. & B. 61, 62. See *post*, §§ 1644, 1645.

[2] Bank of Republic v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. (4 Otto), 343.

settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money to the plaintiff's use; and therefore under an implied promise to pay it on demand."[1] And in Pennsylvania the exception thus suggested is established.[2] In England a check has been held to constitute no equitable assignment of the fund, although the drawer instructed the banker by letter to place the amount to the drawer's credit, Sir. G. Jessel, Master of the Rolls, saying: "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's."[3]

§ 1637. *The opposing view that the check holder may sue the bank* as soon as it wrongfully refuses to pay the check has been taken in a number of cases which were well considered, and rests upon conceptions of the relations of the parties which are consistent with and favorable to the usages of trade, and are difficult to be successfully combated. Thus it has been decided in South Carolina, that the check holder had a right of action in assumpsit against the bank, if it refused to pay the check, when it had funds of the drawer available for doing so, upon the implied promise which the law raises in his behalf.[4] A similar view seems to have been taken in Louisiana.[5] It has been directly and distinctly so decided in Illinois[6] and Iowa,[7] and in Illinois that the right passes by transfer to each successive holder.[8]

[1] Bank of Republic v. Millard, 10 Wall. 152.

[2] Seventh Nat. Bank v. Cook, 73 Penn. St. 485.

[3] Hopkinson v. Forster, 18 Eq. Cases L. R 74 (1874). See § 1638 and note.

[4] Fogarties v. State Bank, 12 Rich. Law, 518.

[5] Vanbibben v. Bank of Louisiana, 14 La. An. 481.

[6] Chicago Marine, &c. Ins. Co. v. Stanford, 28 Ill. 168; Brown v. Leckie, 43 Ill. 500; Munn v. Burch, 25 Ill. 35; Union Nat. Bank v. Oceana County Bank, 80 Ill. 212.

[7] Roberts v. Austin, 26 Iowa, 316.

[8] Union Nat. Bank v. Oceana County Bank, 80 Ill. 212.

The learned editor of Byles on Bills,[1] seems to be of this opinion. And in Kentucky, it has been held, that where the drawer of the check notified the bank by letter, the holder could sue the bank;[2] but the check is itself notification, and we cannot see how a letter from the same hand could add to its effects. If the money is deposited as the check holder's, although in the drawer's name, and the fact is communicated to the bank before any other right has attached to the fund, it would clearly be in equity the property of the holder, and he might recover it of the bank.[3]

§ 1638. Our own views on this question may be expressed as follows: There are four distinct parties who may be immediately interested in the effect of a check drawn upon a deposit (1) The drawer; (2) the holder; (3) the bank; and (4) a stranger claiming the amount under a subsequent check, assignment or levy.

(1) Now, as between the drawer and the payee (or holder), there is no doubt that the delivery of the check constitutes an assignment of the amount;[4] and as we have al-

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[1] In Byles on Bills (Sharswood's ed.) [*21], 96, note 1, it is said by the learned American editor: "A bill of exchange is not an equitable assignment or appropriation, but the cases treat a check on a banker as such; and if the holder is a holder for value, as to whom the drawer cannot revoke rightfully the power which he holds, coupled with an interest, why should not the banker upon distinct claim and notice be held bound by the equity."

[2] Lesler v. Given, 8 Bush (Ky.) 361. See Weinstock v. Bellwood, 12 Bush (Ky.) 140.

[3] Allen v. American Nat. Bank, 3 Lans. 517 (1871). See Hopkinson v. Foster, 18 Eq. Cas. L. R. 74 (1874) and *ante*, § 1636.

[4] Matter of Brown, 2 Story, 502; Bell v. Alexander, 21 Grat. 6 Bank of Republic v. Millard, 10 Wall. 152; Morrison v. Bailey, 5 Ohio St. 13; Robinson v. Hawks, 9 Q. B. 52. In Keene v. Beard, 8 C. B. N. S. 372, Byles, J., said: "In one thing a check differs from a bill of exchange; it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer's in the hands of a drawee of a bill of exchange." But it has been remarked, touching this expression of Byles, J., by Sir G. Jessel, Master of the Rolls, in Hopkinson v. Forster, 19 Eq. Cas. L. R. 74 (1874): "I do not understand the expressions attributed to Mr. Justice Byles, in Keene v. Baird; but I am quite sure that learned judge never meant to lay down, that a banker who dishonors a check is liable to a suit in equity by the holder."

ready seen, it is a fraud to give the check without having a corresponding amount to meet it.[1] But as yet the drawer and payee (or holder) are the only parties whose rights are affected by the check. Something more is necessary to affect the bank, or a stranger holding another check. As soon as the payee (or holder) presents the check to the bank and demands payment, we think that thing is done.[2] For the bank is then notified of the appropriation of the amount to the holder. If a subsequent check is presented, drawn on the same fund, it would be a fraud upon the holder to pay that, and thus deprive him of his precedence.

If a subsequent assignment, in a different form, were made of the fund by the drawer, it would be valid against the drawer if communicated to, and acted upon by the bank before presentation of the check. For otherwise the bank would suffer from a wrong committed by the drawer in which it had no participation.

The objection to the check holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true there is no privity before the presentment of the check, but by that very act they are brought in privity, and the checkholder's right to sue the bank completed.

The sole motive often, if not generally, inducing the depositor to place his funds in bank is the desire to have them in safety, where they may be checked on at convenience. The bank receives its reward in the use of the money, and in the business attracted in checking it out. And it is the universal understanding between banks and depositors, arising from the customs of trade, that the check of the lat-

[1] See *ante*, § 1596.

[2] In Morse on Banking, 471, it is said: "It is true—and it is all that the cited cases decide—that before demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences. But the act of presentment and demand, made before any one of these occurrences has taken place, is the act which creates at once, by usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an appropriation."

ter is to be paid upon presentment.[1] The drawer of the check makes the deposit, and draws the check with this understanding. The bank receives the money with the like understanding, and so the holder receives the check. And the mutual understanding of the parties, although they have not individually concerted together, creates an implied privity, and completes the contract between them.

§ 1639. But it is again objected, that if the holder could sue the bank for the amount, it would be liable to a suit

[1] Roberts v. Austin, 26 Iowa, 324. "As to the objection of want of privity, although at one time there was some conflict of opinion, it is now laid down by text writers to be settled, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him. 2 Greenl. on Ev. § 109, and authorities cited in note 1. Nor does it make any difference in principle that the beneficiary or party suing upon the promise was unknown to the promisor. This want of knowledge by the promisor as to who will be the party enforcing the promise exists in the case of every negotiable instrument. The promisor having made his promise upon sufficient consideration, whether it is in writing, verbal or implied, may and ought to be required to perform it according to the tenor of it, and not otherwise, to the party becoming entitled thereto."

"As to the objection of liability to several parties who may hold the checks, instead of to the one depositor, it should be remembered that, by the custom of merchants and bankers everywhere, alike well known to farmers, mechanics, merchants, bankers and courts, the party receiving the deposit does so upon either an express or implied promise to pay the same upon presentation of the checks of the depositor, by whomsoever presented. If, therefore, he is made liable to numberless parties, it is because of his promise made for their benefit, and known to them, and which he has failed to perform." Munn v. Burch *et al.* 25 Ill. 35.

"And if it be true, as it doubtless is, that the banker is liable to the depositor for the damages resulting to him by reason of the failure to pay his checks, this liability ought not, upon principle, to exempt him from the performance of his promise or undertaking to pay the checks; the holder may enforce the promise, while the depositor recovers nominal or special damages for the breach of it. Rolin v. Stewart, 14 C. B. 595. Parties are often liable to two actions at law, by different suitors, for one and the same wrongful act. A trespasser upon real estate may be liable, for one trespass, to two actions—one by the tenant, the other by the reversioner. So a party promising to discharge an incumbrance, and failing to do so, may be liable to an action by the promisee, and also to an action by the party holding the incumbrance. These are but illustrations of a large class of cases, both in tort and upon contract, where a party may be liable to two actions by different parties for the same wrong, or upon a breach of the same promise." See *post*, § 1643, note 4, and § 1644 and notes.

from two different persons for the same thing, as the depositor could sue it also.[1] But while the depositor could sue the bank for the wrong done in refusing to pay his check, and recover any consequential damages,[2] he could not, we should say, sue it for the amount of the check after its presentment. For then the assignment is completed as against the bank—its assent has been obtained by its reception of the deposit, the right of the depositor parted with, and of the holder perfected. And while both depositor and holder could sue the bank, their causes of action would be as distinct as a tort is from a contract.[3]

And from these views our conclusion is, that the check holder has two remedies.

§ 1640. *First:* he may sue the drawer of the check and the bank in one action—the former as drawer, and the latter as an implied acceptor. For as an acceptance of a bill may be implied, so may the acceptance of a check. And as a promise to accept will operate as an acceptance to the holder who takes a bill on the faith thereof, so should it be as to a check. Now, by the very act of drawing a check, the drawer communicates to the payee the fact that the bank holds that amount to his credit, which it has agreed to pay on his check. By receiving the deposit, the bank has impliedly so agreed. And the holder receiving the check, in reliance on this condition of things should be sustained, provided the drawer has not deceived him by drawing without funds to meet the check, and allowed to proceed against both parties in the manner above indicated.

It is no answer to these views to say that the holder of a bill cannot sue the drawee unless it be accepted. The drawee

[1] Bank of Republic v. Millard, 10 Wall. 156, Davis, J.: "It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise for the same thing, existing in two distinct persons at the same time."

[2] Morse on Banking, 234; 2 Parsons N. & B. 62; Hopkinson v. Forster, 18 Eq. Cas. L. R. 74.

[3] See Roberts v. Austin, *ante*, p. 555.

of a bill does not receive money to be paid out on checks. And the distinction between the bank or banker on whom the check is drawn, and the ordinary drawee of a bill, is the very gist of the distinction between the rights of the holders of the different instruments.

§ 1641. *Second:* the check holder may sue the drawer of the check on its dishonor, or sue the bank for money had and received to his use; for, as we have said, the bank receiving a deposit receives it for the use of the depositor, and for the use of such persons as he may order it to be paid to by his checks. Assumpsit is an equitable action, and *ex æquo et bono*, the check holder should be entitled to recover from the bank the amount for which he holds the depositor's order.

§ 1642. The depositor may always recover nominal damages from the bank improperly dishonoring his check, and a trader may recover substantial damages. If not a trader, the depositor would have to allege and prove special injury.[1] An agent who has put to his private account funds of an undisclosed principal, may recover damages from the bank for refusal to honor his check upon them, although he had improperly obtained them.[2]

SECTION XI.

HOW FAR A CHECK IS AN ASSIGNMENT OF THE FUND DRAWN UPON.

§ 1643. We have seen already that a check operates as an assignment of the fund on which it is drawn *pro tanto*,

[1] Rolin v. Stewart, 14 C. B. (5 J. Scott), 607 (78 E. C. L. R.) Williams, J., said: "I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damage were alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract; just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."

[2] Tassell v. Cooper, 9 C. B. 509.

from the very time it is drawn and delivered, as between the drawer and the payee or holder.[1] And *secondly*, that the assignment binds the bank as soon as the check is presented.[2] *Thirdly*, that as between the drawer and holder on the one part, and a party claiming under a subsequent assignment on the other, that if the latter holds a check also, and first presents it, he thereby acquires priority over the check not previously presented.[3] And any subsequent assignee to whom the bank had assented to pay the amount would, in like manner, acquire priority, as the bank would be bound to pay him in preference to the prior check holder who had not presented the check.[4] But if the check were presented before any subsequent assignee had obtained the assent of the bank, and thus brought it in privity of contract with it, we should say that by such presentment the check holder acquired priority for the reasons that have been heretofore considered.[5] And, therefore, a general assignment for the benefit of creditors would not defeat the check holder, although he had not presented the check,[6] nor would the

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[1] *Ante*, § 1638. [2] *Ante*, § 1638. [3] *Ante*, §§ 1617, 1638.

[4] *Ante*, § 1617. [5] *Ante*, § 1617. *Contra*, cases cited, § 1636.

[6] Roberts v. Austin, 26 Iowa, 327. Cole, J.: "The controversy then is simply this: Markell having received full consideration therefor, draws his checks upon his banker, with whom he has funds on deposit for their payment. Afterward, and before their presentation, Markell (by his assignee) notifies the drawee to withhold payment. This is done without any claim of wrong on the part of the drawees, and without any pretense or suggestion against their just and equitable right to the money specified in the check.

"Now, as between Markell on the one hand, and the holders of these checks on the other, in whose favor are the equities? No person could hesitate for a single moment in declaring that the money (which in effect has been brought into court for the benefit of the party entitled thereto) should be paid to the holders of the checks, rather than to Markell, who has once received from them the money which the checks represent. If, as between Markell and the holders, the latter would be entitled to the money, then, since the assignee of Markell stands in his shoes and succeeds only to his rights, the holders of the checks would be entitled to the money as against the assignee, and this, too, regardless of whether the holder of a check can maintain his action against the drawee, or whether a check operates as an assignment *pro tanto*, of the deposit, as hereinbefore discussed." *Contra*, Lunt v. Bank of North America, 49 Barb. 221.

appointment of a receiver to take possession of the funds of the drawee.[1]

§ 1644. It is a principle of law that wherever there is a legal or equitable assignment of a debt or fund prior to service of attachment or garnishment process upon the debtor, the assignee is entitled to priority over the attachment or garnishment creditor, provided he makes it known to the court in time to intercept its judgment in favor of such creditor, even though the party owing the debt or holding the fund assigned should not have had notice of such assignment prior to the service of such process,[2] and *a fortiori* does the rule apply where there is notice.[3]

And as a check is an assignment of the fund *pro tanto*, it would, upon this principle, defeat an attachment or garnishment, although not presented until after process was served upon the debtor.[4] This doctrine rests upon the ground that the attachment or garnishment creditor acquires no rights but those subsisting in his debtor at the time that process is served on the garnishee, and is in effect a mere suitor for whatever his debtor might then have a right to recover.

§ 1645. In England it is held that there are some cases in which equity would regard a check as an assignment of

[1] Merrill v. Anderson, 17 N. Y. S. C. (10 Hun), 606 (1877). See Duncan v. Berlin, § 1644, note.

[2] Anderson v. De Soer, 6 Grat. 364; Maher v. Brown, 2 La. 492; Giddings v. Coleman, 12 N. H. 153.

[3] Legro v. Staples, 16 Me. 252; United States v. Vaughan, 3 Bin. 394; Colt v. Ives, 31 Conn. 25; Nesmith v. Drum, 8 Watts & S. 9; Adams v. Robinson, 1 Pick. 461.

[4] See Chapter I, §§ 15, 16, *et seq.* vol. 1; also Wheatley v. Strobe, 12 Cal. 98. But *contra*, that a check is not an assignment, and will not defeat an attachment, see Tyler v. Gould, 48 N. Y. 682; Loyd v. Caffrey, 46 Penn. St.; Duncan v. Berlin, 60 N. Y. 151 (1875), Church, C. J.: "A check upon a bank does not operate as an assignment of the money deposited. * * A parol acceptance is not valid (1 R. S. 768). The promise did not bind the bank, and no action would lie upon it in favor of the holder. The case of Bullard v. Randall, 1 Gray, 605, was similar in its circumstances to this; and the court held they would not avail against the lien of a trustee process served before the check actually reached the bank. When the attachment was served, the check had neither been accepted, certified nor paid, nor had it in fact been presented for payment." *Held* that the attaching creditor had priority.

the fund, as in the case of the death of the drawer, and the consequent revocation of the banker's authority (which is there held to be its effect), the holder may have relief in equity against the banker.[1] But, as a general rule, a check is not there regarded as an assignment.[2]

SECTION XII.

CHECKS AS EVIDENCE.

§ 1646. *In the hands of the payee*, a simple check which is unpaid and has not been presented for payment, cannot be used as evidence of any indebtedness from the drawer to the payee, for the drawer has only contracted that the bank should pay the amount on demand, and until demanded the drawer is not bound.[3] But when this is done and shown, the check then imports a debt from the drawer to the payee, and it may be sued on without proving the consideration, value received being presumed.[4]

In the hands of an indorsee, the check, in like manner, is not sufficient evidence that the drawer owes the debt, unless a demand upon the bank and refusal to pay be shown;[5] and as against the indorser, proof of notice of non-payment must be superadded.[6]

The natural inference from the giving of a check is, that it was given in payment of a debt due the payee from the drawer, or that the payee gave cash for it when it was drawn, and in order to charge the payee as a debtor to the drawer, it must be shown that the check was in fact loaned him.[7] Where the drawer's executor sued the payee of a

[1] Rodick v. Gandelle, 12 Beav. 325; 1 D. G. M. & G. 763.

[2] Hopkinson v. Foster, L. R. 19 Eq. 74.

[3] Flemming v. McClain, 13 Penn. St. 177; Pearce v. Davis, 1 Moo. & R. 365; 2 Parsons N. & B. 83.

[4] See *infra*, § 1652. Mr. Morse states that there must be "proof of the consideration on which the check was given." Morse on Banking, 290, 312. This is incorrect. See cases below, and see *infra*.

[5] *Ante*, §§ 1586, *et seq.* [6] Ibid.

[7] Huntzinger v. Jones, 60 Penn. St. 170; Connelly v. McKean, 64 Penn. St.

paid check for the amount, charging that it was a loan, Lord Kenyon, C. J., said: "There is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time."[1] But when it is shown that cash was not given for the check, that it was not taken in payment of a debt, there is no presumption that it was intended as a gift; and unless it were proved to have been so intended, the payee would be chargeable with the amount as a loan.[2] And whenever a loan from the drawer to the payee is proved, the check may be given in evidence of the amount.[3]

§ 1647. *In the hands of the bank*, a check drawn upon it imports that the bank held funds of the drawer upon deposit, and has paid, out of them, the amount of the check to the holder.[4] And it does not import a loan from the bank to the drawer; but if it appears that the check was paid without funds, an implied promise is raised that the drawer will refund the amount to the bank.[5]

§ 1648. *In the hands of the drawer*, a check payable to a certain party or order, and bearing his indorsement, and which has been paid by the bank, is as good a receipt for money paid to the payee as the drawer could desire.[6] But if the check were drawn payable to A. or bearer, or to bearer, which is the same in legal effect, it is not, *per se*, evidence in

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118; Patten v. Ash, 7 Serg. & R. 116; Graham v. Cox, 2 Car. & K. 702; Headley v. Reed, 2 Cal. 322; Thompson v. Pitman, 1 Fost. & F. N. P. 339; 2 Parsons N. & B. 84; Yates v. Shepardson, 39 Wisc. 173.

[1] Cary, Ex'r of Greatorex v. Gerrish, 4 Esp. 9.

[2] Baker v. Williamson, 4 Penn. St. 456; Huntzinger v. Jones, 60 Penn. St. 170.

[3] Healy v. Gilman, 1 Bosw. 235.

[4] Lancaster Bank v. Woodward, 18 Penn. St. 361; Conway v. Case, 22 Ill. 127; Healy v. Gilman, 1 Bosw. 235; Fletcher v. Manning, 12 M. & W. 571.

[5] Fletcher v. Manning, 12 M. & W. 571; Thurman v. Van Brunt, 19 Barb. 409; Morse on Banking, 290, 291.

[6] Connelly v. McKean, 64 Penn. St. 113; Egg v. Barnett, 3 Esp. 196; Thompson v. Pitman, 1 Fost. & F. N. P. 339.

the drawer's hands, of payment to A. It must be proved that the party alleged to have been paid by the check received the money.[1] And if the check be payable simply to A., it seems that mere payment of the check is not evidence that A. received the money, unless the check bear A.'s indorsement.[2] But it may be doubted if the bank can require his indorsement unless the check be payable to his order.[3] And clearly, it cannot require the holder's indorsement when the check is payable to bearer.[4]

Without proof of the particular consideration, a check is not evidence that it was paid upon a particular account.[5]

§ 1649. It is almost, and indeed we suppose quite the universal custom of banks which have paid the checks of their depositors, to cancel them by some mark indicating that they have been paid, and to return them in the depositor's bank pass book as vouchers for the amounts paid out from his funds on deposit. And, doubtless, an obligation to do this may be inferred in most cases from the usage of business, and the prior course of dealing between the bank and its depositor.[6] When the bank pays the holder the amount of the check, it is clearly entitled to the possession of it as a voucher for the payment.[7] But after debiting it against the drawer in account with the bank, it is the duty of the bank to return the check to its depositor, who has the better right to their permanent possession, as they are to him vouchers of payment of his debt to the payee named in them; and the bank, until it returns the checks, has been said to hold them only as agent of the drawer.[8] In the case of over-checks, it would doubtless be different, for they might be the only con-

[1] Patten v. Ash, 7 Serg. & R. 116; People v. Baker, 20 Wend. 602; People v. Howell, 4 Johns. 296; Mountford v. Harper, 16 M. & W. 825; Pearce v. Davis, 1 Mood. & R. 365; Lloyd v. Sandilands, Gow, 13.

[2] Flemming v. McClain, 13 Penn. St. 177.

[3] 2 Parsons N. & B. 83. [4] Connelly v. McKean, 64 Penn. St. 113.

[5] Aubert v. Walsh, 4 Taunt. 293.

[6] Morse on Banking, 291; see Regina v. Watts, 2 Den. C. C. 14.

[7] Matter of Brown, 2 Story, 512.

[8] Burton v. Payne, 2 Car. & P. 520; Grant on Banking, 72, 75; Morse, 291.

clusive evidence that the bank possessed of the advance to the drawer, and this it would not be just to require it to part with.[1]

§ 1650. When a suit is brought for money lent by a check, it has been held that the statute of limitations runs from the time the money was paid by the drawee, and not from the time the check was drawn, as otherwise it would follow that if an action had been brought by the drawer for money lent, he would be able to recover the amount, although the check might be subsequently dishonored.[2]

§ 1651. *Negotiability of checks.*—A check, like a bill or note, in order to be negotiable, must be payable absolutely, and at all events to a certain person or order, or to bearer, in money. If expressed to be payable "in bank bills," or "in currency,"[3] or if it lack words of negotiability,[4] or be deficient in any of the characteristics which impart negotiability to bills and notes, it will not be a negotiable instrument. Checks are sometimes, although by no means usually, intended for temporary circulation; but their principal object and purpose is to enable the holder to demand and receive immediately the amount called for. Negotiability in its full sense is, therefore, not of their essence, but an optional quality.[5]

§ 1652. Whenever a check is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange in respect to the rights of the holder. In the *first* place, it is evidence of a valuable consideration as between

[1] Grant on Banking, 73; Morse on Banking, 293.

[2] Garden v. Bruce, L. R. 3 C. P. 300.

[3] Bank of Mobile v. Brunn, 42 Ala. 108; Little v. Phœnix Bank, 2 Hill (N. Y.), 425.

[4] Partridge v. Bank of England, 9 Q. B. 396. In Virginia checks are regulated by the statutory provisions which apply alike to bills and notes, even as respecting protest, and negotiable, if payable (1) at a particular bank, or (2) at a particular place thereof, for discount or deposit, or (3) at the place of business of a savings institution or savings bank, or (4) at the place of business of a licensed broker. Code, chap. 144, § 7. Acts 1866, p. 149.

[5] Mohawk Bank v. Broderick, 10 Wend. 304.

the immediate parties thereto, and between the plaintiff and the drawer when payable to bearer.[1] In the *second* place, it may be transferred by indorsement, or by delivery without indorsement when payable to bearer.[2] In the *third* place, when sued upon, the possession is *prima facie* evidence of title, and the plaintiff is presumed to be a *bona fide* holder for value without notice of any defense existing between prior parties, and such defenses cannot be pleaded against him.[3] In the *fourth* place, even when it is proved that the real owner parted with it, or that the drawer drew it without consideration, the burden of proving *bona fide* ownership for value without notice will not devolve upon the holder;[4]

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[1] In Morse on Banking, p. 312, it is said: "Possession is *prima facie* proof of title; but the plaintiff in a suit upon the check (payable to bearer) must show that he received it for value, and in the due course of business." The cases cited by the author do not sustain this proposition. On the contrary, they accord with the text which states correctly the doctrine which prevails in respect to checks whether payable to bearer or to order, and in respect to all other negotiable instruments.

In Conroy v. Warren, 3 Johns. Cas. 259, the check was payable to "No. 912 or bearer." It was declared on as given by defendant to plaintiff. Thompson, J., said, in answer to the objection that where a check is payable to bearer it is incumbent on the holder to prove a valuable consideration: "I take it to be well settled that with respect to bills of exchange and promissory notes, they in this respect stand on the same footing with specialties, and *prima facie* import a consideration. * * * The reason of the rule is equally applicable whether the bill or note be made payable to bearer or order, and I can see no good reason why it should not apply to bank checks." Hoyt v. Seeley, 18 Conn. 357, Waite, J.: "Here the plaintiff has declared upon this check as payable to bearer, and has averred that he is the lawful bearer thereof, and entitled to the payment of the money therein specified. This is enough to show a right of action in the plaintiff. The circumstances under which he became bearer are immaterial." Mauran v. Lamb, 7 Cow. 176.

[2] Conroy v. Warren, 3 Johns. Cas. 259; Merchant's Bank v. Spicer, 6 Wend. 445; Woods v. Schroeder, 4 Har. & J. 276; Hoyt v. Seeley, 18 Conn. 353; Keene v. Beard, 8 C. B. N. S. 380 (98 E. C. L. R.)

[3] Cruger v. Armstrong, 3 Johns. Cas. 7. The check was payable to W. & J. C., or bearer. Radcliff, J., said: "The holder must *prima facie* be deemed the rightful owner, and it has accordingly been held that he need not prove a consideration, except where circumstances of suspicion appear." Murray v. Judah, 6 Cow. 484; Mauran v. Lamb, 7 Cow. 176; Harbeck v. Craft, 4 Duer, 131; Merchants' Nat. Bank v. New Brunswick Sav. Inst. 33 N. J. Law (4 Vroom), 172; Kuhns v. Gettysburg Nat. Bank, 68 Penn. St. 445; Cecil Bank v. Heald, 25 Md. 563; Stewart v. Smith, 17 Ohio St. 82.

[4] See Chapter XXIV, Section VII, §§ 810 *et seq.* vol. 1.

but when shown to have been drawn for an illegal consideration, or to have been obtained from the drawer by fraud or theft, the burden of proof is thrown upon the holder, and he must show a *bona fide* title in order to recover.[1]

§ 1653. Even a check payable to bearer may be transferred by indorsement, though such checks are more generally passed by delivery merely. It is not, however, a necessary inference from the fact that a person has written his name on the back of a check payable to bearer that he intended to indorse it, as his name may have been written thereon for very different purposes. Thus it is customary in England for the holder of a check payable to bearer, upon receiving payment, to write his name on the back, and the usage of business gives to this simply the signification of his receipt for the money.[2] Such an indorsement creates no liability. And whenever a check payable to bearer has a party's name so written thereon, it has been held in England necessary to prove the *animo indorsandi* in order to bind him.[3] When this is done he is undoubtedly bound as an indorser, and it was answered by Byles, J., in England, to counsel that argument to the contrary "would have been deserving of more attention if it had been addressed to the court a hundred years ago."[4]

A bank is not subject to charge for interest on sums deposited subject to check until payment is demanded, unless by special contract.[5]

SECTION XIII.

FORGERIES OF CHECKS.

§ 1654. In another portion of this volume we have treated of forgeries of bills and notes, and also of alterations,

[1] Fuller v. Hutchings, 10 Cal. 523; Merchants' Nat. Bank v. New Brunswick Sav. Inst. 33 N. J. Law (4 Vroom), 172; Kuhns v. Gettysburg Nat. Bank, 68 Penn. St. 445.

[2] Morse on Banking, 312. [3] Ancona v. Marks, 7 Hurlst. & N. 686 (1862).

[4] Keene v. Beard, 8 C. B. N. S. 372 (98 E. C. L. R.)

[5] Parkersburg Nat. Bank v. Als, 5 West Va. (Hagans), 50.

but it is desirable to keep distinct the various classes of commercial paper affected by such frauds, and checks are governed to some extent by principles peculiar to them alone. We have seen that the drawee of a bill is bound to know the drawer's signature. In like manner, a bank is bound to know the signature of a depositor who draws a check upon it; and it has been said that the bank "is even more bound" to know such depositor's handwriting than a drawee is bound to know a drawer's.[1] And this view is founded on reason, for, as a general rule, a deposit is made for the very purpose of being checked out, while a drawer has no right to require a drawee to accept or pay his drafts.

But a bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer.[2] If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's, until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions.[3]

§ 1655. As a bank must know its customer's signature, it has been held, and as a general rule the doctrine prevails, that if it pays out money on a forged check it cannot recover back the amount from the party to whom it was paid.[4] Ordinarily money paid under a mistake of fact may be recovered back, however negligent the party paying.[5] But

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[1] Smith v. Mercer, 6 Taunt. 76.

[2] National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 213; Bank of Commerce v. Union Bank, 3 Coms. 230; Redington v. Wood, 45 Cal. 406; National Park Bank v. Ninth National Bank, 55 Barb. 124; 46 N. Y. 77; Bigelow on Estoppel, 435, 436.

[3] Redington v. Wood, 45 Cal. 406.

[4] Levy v. Bank U. S. 4 Dall. 234; Bank U. S. v. Bank of Ga. 10 Wheat. 333; see Chapter XLII, on Forgery, § 1359; First National Bank v. Ricker, 71 Ill. 439.

[5] See Vol. II, § 1369.

that rule has not been generally deemed applicable in such cases as this, for, as is said, "the fact in this case is one in which the drawee has no right to mistake. The law refuses to hear him say he has mistaken it. The money is paid through the failure to fulfill his acknowledged duty, inasmuch as he has failed to detect this very non-existence of the merely supposed fact of signature by a certain person."[1] No doubt there are cases which bear out this view. But where the bank discovers the forgery immediately, and demands restitution, offering to return the check, before the holder has lost anything by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount. Mr. Chitty seems to have had the same opinion.[2] And Professor Parsons has expressed it in favorable terms.[3] And the better doctrine, as we think, is, that the bank should have the right to recover, unless the circumstances of the holder had been changed so as to render it unjust.[4] Forgeries often deceive the eye of the most cautious and practiced expert; and when a bank has been so deceived, it is a harsh rule which compels it to suffer, although no one has suffered by its being deceived. It is also

[1] Morse on Banking, 296.

[2] Chitty on Bills (13th Am. ed.) [*431], 485; see *ante*, Chapter XLII, on Forgery, §§ 1361 *et seq.*; also Irving Bank v. Wetherald, 36 N. Y. 335.

[3] 2 Parsons N. & B. 80, where it is said: "It is obvious that it (the bank) can reclaim the money from the payee, if the payee were in fault. But a more difficult question arises where a bank pays a forged check to an innocent holder. The cases on this subject are few and indecisive; but we think the law must be this: The bank can recover it from the payee, if the payee were in fault, or if an innocent payee will then be in no worse condition than if the bank had refused to pay it. Still, the bank, rather than the holder, is bound to know whether the signature be genuine; and if by any change of accounts, by any consideration paid which might have been recovered had payment been refused, but cannot be recovered now, or by any loss of opportunities to get security or indemnity from the transferrer which the holder would have had but for the payment to him, the payee cannot be replaced in as good a position after he returns the money to the bank, then we say he is not bound to return it. Perhaps injury to the payee, by the demand of repayment, would be so far presumed, as matter of law, as to cast upon the bank the burden of proof."

[4] See Chapter XLII, on Forgery, § 1361, and p. 327, note 2; see also Am. Review, April, 1875, p. 433.

a rule which tends to render those who trade for checks incautious, if by any means they can procure their payment by the bank. Parties often pronounce forgeries of their own signatures genuine.[1] Why blame a third party so severely? And why make an exception to a rule so just in its universal application?

§ 1656. The doctrine that a bank is bound to know its customer's signature has been very strictly applied by the Supreme Court of the United States. Where the plaintiff deposited in the bank a check purporting to be drawn by one of its customers, and it was at once passed to the plaintiff's credit on his cash book, but on the same day it was discovered by the bank to be a forgery and instantly returned to him, the court held that the plaintiff was entitled to refuse to take it back, and hold the bank liable for the amount in account with him. And it was said: "It is our opinion that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it shall be so taken."[2] The case in which this view is taken has been quoted with approval,[3] but it does not commend itself, as we humbly think, to favor.

§ 1657. Even where the general doctrine, that the bank has no remedy where it has certified or paid a forged check against the holder, is recognized as a fixed principle of law, there are some exceptions which are insisted upon as reasonable and just. As the responsibility of the bank is based upon the presumption that it has greater means, and better opportunities to become familiar with the handwriting of depositors than are afforded the holder, it is declared to be decisive alone when the party holding the check has in no way contributed to the success of the fraud. And if the loss can

[1] Morse on Banking, 310.

[2] Levy v. Bank of U. S. 4 Dal. 234; 1 Bin. 27. It is not stated in the report that it was a customer's check, but this inferentially appears.

[3] Bank U. S. v. Bank of Georgia, 10 Wheat. 333.

be traced to the fault or negligence of any party it will be fixed upon him.[1] In the absence of actual fault or negligence on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude its recovering back the amount, or recalling its certificate, as against one who has received the money, or taken the check with knowledge of the forgery; or who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the bank, or to induce payment or certification, of the check, without the usual scrutiny or precautions against mistake or fraud.[2]

Accordingly, it has been held, that where a bank paid a check on which its depositor's name was forged, and which was presented by another bank, to which it was paid in accordance with a custom to rely upon the bank holding the check to assure its genuineness, the amount might be recovered back.[3] And so where the payees took from a stranger a check payable to their order, and put it in circulation with their indorsement thereon, thus giving it currency and credit, it was likewise held that the amount might be recovered back.[4] So where the holder of a check having reason to

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[1] Gloucester Bank v. Salem Bank, 17 Mass. 33, 42.

[2] National Bank of N. A. v. Bangs, 106 Mass. 445; Ellis v. Ohio Ins. &c. Co. 4 Ohio St. 628; First National Bank v. Ricker, 71 Ill. 439.

[3] Ellis v. Ohio Life Ins. &c. Co. 4 Ohio St. 628; see Chapter XLII, on Forgery, § 1361.

[4] National Bank of N. A. v. Bangs, 106 Mass. 444, Wells, J., saying: "In the present case the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it, the check could not properly be paid by the plaintiffs. Their indorsement tended to divert the plaintiffs from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name.

"But to the defendants, the presentation, by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate for them for value, was a transaction which should have

question its genuineness, presented it to the drawee bank and demanded payment without disclosing his suspicions, and the bank teller, doubting its genuineness, refused to pay it unless the holder indorsed it,—it was held that on discovering that it was forgery of the drawer's name, the bank might recover back the amount paid from the party who presented it for payment.[1] The payee or indorsee of a check whose indorsement is forged upon it, and upon which forged indorsement the bank has paid the check, may recover the amount of the check from the bank, which is regarded in judgment of law as holding it for the lawful owners; and it cannot exonerate itself from its obligation by showing that it paid the amount to others, who had not been authorized to receive it.[2]

SECTION XIV.

ALTERATIONS OF CHECKS AFTER ISSUE.

§ 1658. The general principles as to alteration which apply to bills and notes, and which have been hereinbefore discussed, apply as well to checks. It was not long since seriously argued in the English Court of Appeal, Exchequer Division, that the alteration of the date of a check from the "2d" to the "26th" of March was not material, and that it

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aroused their suspicions. It ought to have put them on inquiry for explanations; and if inquiry had been properly made it would have disclosed the fraud and prevented its success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions, as to deprive them of the right to throw the loss upon another party who acted in like good faith, and also without fault or want of due care.

"It is possible that the defendants may have received the check under circumstances which would exonerate them from the imputation of any actual fault or neglect. But the agreed statement fails to disclose any such explanation. A majority of the court are therefore of opinion that judgment must be for the plaintiffs, for the amount of the check and interest from the time it was paid." See Carpenter v. Northborough National Bank, 123 Mass. 69.

[1] First National Bank v. Ricker, 71 Ill. 439.

[2] Johnson v. First National Bank, 13 N. Y. S. C. (6 Hun), 126. See also Talbot v. Bank of Rochester, 1 Hill, 295.

was valid in the hands of a *bona fide* holder without notice, and who had been guilty of no negligence in taking it, and the inferior court had so held. The Court of Appeal overruled this decision and held the check vitiated.[1] It not infrequently happens that a check genuine in its inception is altered after it leaves the hands of the drawer to a much larger amount; and that the bank, relying on the genuineness of the signature, pays such increased amount to the holder, and charges up the check in account with the drawer. The questions then arise: *First*, When and under what circumstances may the bank credit the drawer with the entire amount; and *second*, when may it recover back the amount in excess of the original and genuine amount from the party to whom it was paid.

As to the *first* question, as a general rule the bank can only charge the original amount against the drawer, for that limits the extent of his authority to it to pay out his deposit;[2] and if his check has been altered by any party, such alteration is a forgery of his name, for which he is by no means responsible, provided he afforded no opportunity for its commission.[3]

§ 1659. But when the drawer has drawn his check in such a careless or incomplete manner, that a material alteration may be readily accomplished without leaving a perceptible mark, or giving the instrument a suspicious appearance, he himself prepares the way for fraud, and then, if it is committed, he and not the bank should suffer. Thus, a depositor on leaving home gave his wife several checks signed in blank; and she filled up one for fifty-two pounds, two shillings, but

[1] Vance v. Lowther, 1 Exchequer Division, 176 (1876); 16 Moak's English Rep. 583.

[2] Robarts v. Tucker, 16 Q. B. 560; Smith v. Mercer, 6 Taunt. 76; Hall v. Fuller, 5 B. & C. 750, Bayley, J., said: "If, unfortunately, he (the banker) pays money belonging to the customer upon an order which is not genuine, he must suffer; and to justify the payment he must show that the order is genuine, not in signature only, but in every respect." Byles (Sharswood's ed.) [*323], 490; Chitty (13 Am. ed.) [*430], 485.

[3] *Ante*, § 1344.

began the word "fifty" with a small "f," and wrote it in the middle of a blank line; and also in writing the marginal figures, left a considerable space between £ mark and the figures 52. The check in this form was handed to her husband's clerk to get the money, and he, after inserting "three hundred" before the word "fifty," and "3" before the figures "52," presented it and drew three hundred and fifty-two pounds. It was held that the whole amount was chargeable against the drawer, as the careless drawing of the check had made the forgery easy and simple.[1] It has been thought that if the body of the check had been in the drawer's handwriting, and the additions had been made in a stranger's, the bank would have been put upon inquiry.[2] But the two different hands appearing in the case cited, the wife's and the clerk's, were not considered to have that effect; and it has been held in the United States that the difference in handwriting does not alter the question.[3]

§1660. Sometimes the check is altered in other respects than in the amount after it has been issued by the drawer; as, for instance, in the name of the payee. In such cases the bank is not entitled to charge the check against the drawer, unless he drew the check so carelessly as to afford an opportunity for the fraud. Thus, in Massachusetts, two checks were filled up by the plaintiffs, payable to the order of two payees, and after being examined by the book-keeper, they were sent to the post-office by a clerk in sealed envelopes, addressed to the payees respectively. The clerk opened the envelopes, withdrew the checks, canceled the words "or order" in lead pencil, and inserted the words "or bearer" in ink, and then obtained the money for them from the bank. The court held that the depositors were clearly entitled to

[1] Young v. Grote, 4 Bing. 253. The case of Bank of Commerce v. Union Bank, 3 Coms. 230, might seem to conflict with this, but the alteration there was in words, and was not attributable to the drawer's negligence. The criticism upon this latter case made in Redfield & Bigelow's Lead. Cas. 62, was afterward corrected in Bigelow on Estoppel, 435, note 2.

[2] Grant on Banking, 17, 18; Morse on Banking, 303.

[3] Bank of Commerce v. Union Bank, 3 Coms. 230; *ante*, § 1654.

recover their deposit from the bank which had paid it out on the altered checks.[1] Thus, it seems that unless the drawer has made open the way for an alteration, the bank takes an altered check, whether the alteration be openly done, as in this case, or skillfully concealed, as in others, at its peril. The words "or order" are frequently replaced by the words "or bearer," and the reverse. And the lesson of caution and prudence on the part of the bank cannot be too well learned or too closely followed. Its only safeguard is to scrutinize checks severely, and never to pay one at all mutilated in its appearance until after inquiry.

§ 1661. *As to recovery of excess paid by the bank upon an altered check.*—Where money is paid by the bank upon a "raised" or altered check by mistake, the general rule is that it may be recovered back from the party to whom it was paid, as having been paid without consideration, but if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss. This doctrine is clear, and is sustained by authority. The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance which inflicts injury upon another party, there is no reason why the bank should not be re-imbursed.[2] Its certification of the check does not preclude it from showing an alteration;[3] nor does its teller's declaration, after he has examined it, that it is right in every particular.[4]

§ 1662. In the transfer of bills, notes and checks by the holder to another party, the very act of transfer makes the transferrer an implied warrantor of the genuineness of the instrument; and the transferee may recover on the instru-

[1] Belknap v. Nat. Bank of N. A. 100 Mass. 379.

[2] Espy v. Bank of Cincinnati, 18 Wall. 614; Reddington v. Wood, 45 Cal. 406; Nat. Park Bank v. Ninth Nat. Bank, 46 N. Y. 77; 55 Barb. 124; Bank of Commerce v. Union Bank, 3 Coms. 230; Marine Nat. Bank v. Nat. City Bank, 55 N. Y. 211; 59 N. Y. 67; Third Nat. Bank v. Allen, 59 Mo.

[3] Marine Nat. Bank v. Nat. City Bank, 59 N. Y. 67. See *ante*, § 1606, Security Nat. Bank v. Nat. Bank, 67 N. Y. 461.

[4] Security National Bank v. National Bank, 67 N. Y. 461.

ment against the transferrer, as an indorser, if he indorses it; or may recover back the consideration, if he transferred it without indorsement.[1] But when the bank takes a forged check, its right of recovery does not seem to depend on any indorsement by the holder. It is its duty to know the drawer's signature. And if he takes a forged check from the holder (and he is not himself involved in the fraud), its right to recover back the amount is regarded as turning solely on the question whether or not the holder would be placed in a worse position than if payment had been refused. Such at least is the result of the authorities which recognize the right of the bank to recover.[2]

§ 1663. But a bank is not bound to know the signature of an indorser. And besides, the holder of the check, whether he indorses it or not, warrants the genuineness of all prior indorsements. Therefore, if the bank pay a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid, or from any party who indorsed it subsequent to the forgery.[3] When the bank is in doubt as to the genuineness of an indorser's signature, it is entitled to demand a reasonable time for inquiry before making payment.[4]

There is no doubt that if the bank pays a check upon the forged indorsement of the payee's or special indorsee's name, the payee or such indorsee may recover back the amount, if the check had been delivered to him; and the drawer may recover it back if he had not issued it.[5]

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[1] See §§ 672, 673, 731, 732, vol. 1. [2] *Ante*, § 1655.

[3] Morse on Banking, 308, 310. See also Canal Bank v. Bank of Albany, 1 Hill, 287 (a bill). See *ante*, § 538, vol. 1.

[4] Robarts v. Tucker, 4 Eng. L. & Eq. 236, Maule, J.: "I conceive that if a bill were presented to a banker by a stranger, with an indorsement on it of a person necessary to make out the title, but unknown to the banker, the banker would be justified in refusing to pay at once." Parke, B.: "Probably, in such a case, the obligation would be to pay in a reasonable time."

[5] Morgan v. Bank, 1 Duer, 434; 1 Kern. 404; Dodge v. Nat. Exchange Bank, 20 Ohio, N. S. 216; Seventh Nat. Bank v. Cook, 73 Penn. St. 483.

CHAPTER L.

BANK NOTES.

SECTION I.

DEFINITION, NATURE AND FORMAL ELEMENTS OF BANK NOTES.

§ 1664. Bank notes or bank bills (as they are equally as often called) are the promissory notes of incorporated banks, designed to circulate like money, and payable to bearer on demand.[1]

The terms "bank notes" and "bank bills" are of the like signification, and for the purposes of interpretation, both in criminal and civil jurisprudence, are equivalent and interchangeable.[2]

In form and substance they are promissory notes, and they are governed by very many of the principles which apply to the negotiable notes of individuals given in the course of trade. But they are designed to constitute a circulating medium, and this circumstance imparts to them peculiar characteristics, and essentially varies the rules which govern promissory notes in general.

A bank bill may be described, in an indictment for uttering forged and counterfeit paper, as a promissory note.[3]

§ 1665. Bank bills are usually made payable to bearer, though sometimes expressed to be payable to a certain person or bearer. But in effect the two forms are identical, and though the person named be incompetent to sue in one of the Federal courts of the United States, yet, if the bearer be

[1] See 2 Parsons N. & B. 88.

[2] Eastman v. Commonwealth, 4 Gray, 416.

[3] Commonwealth v. Simonds, 14 Gray, 59; Commonwealth v. Thomas, 10 Gray, 483.

competent he may sue; for a note payable to bearer is payable to anybody, and unaffected by the disabilities of the nominal payee.[1]

§ 1666. They are invariably payable on demand. It is essential to enable them to circulate as currency, that they be redeemable in money at any time, and therefore they are made payable whenever demanded. Banks have often issued their notes payable at a future day, but such instruments are called "post-notes," and are not bank notes in the accepted use of the term.

§ 1667. It would matter not upon what kind of paper the bank note was executed, or whether it were printed or written. But, being designed to circulate as money, they are generally printed on paper of fine fabric, and elaborated with vignettes and fanciful lettering, which, besides being ornamental, subserves the principal purpose of rendering counterfeits difficult. And private marks are often inserted in the texture of the paper, which enhance the facility of identification and the difficulties of forgery.

§ 1668. The privilege of issuing bank notes was, prior to the national banking act, regulated by statutes of the several States, and generally was confined to incorporated institutions, or persons acting under a general banking law; and none but such companies or persons could issue notes designed for the purposes of a circulating medium. But this restriction was purely statutory; for, in the absence of a statute, the right of banking pertains to every private citizen, and any one may issue his obligations in whatsoever form he pleases.[2]

§ 1669. The execution of bank notes should conform to the provisions of the statute authorizing their issue. They are usually required to be signed by the president and cashier of the bank, and when this is requisite, no note will be valid unless so signed. Where bank notes prepared for the official signatures were stolen from the bank's possession, and

[1] Bank of Kentucky v. Wister, 2 Pet. 318.

[2] Morse on Banking, 1.

the signatures forged, it was contended that the negligence of the bank should render it liable for their payment. But it was held otherwise, because the crime had been committed after the notes had left the bank. Had they been complete when they were stolen, it would have been different.[1] If signed, but incomplete, at the time of the theft, it is conceived that they would not be binding on the bank.[2]

The date of bank notes is not evidence of the time they were issued, because they are often held by the bank for a long time after being prepared for circulation; and the date indicates rather the series to which the notes belong than the actual day of issue.[3]

§ 1670. *Bankers' cash notes* are the promissory notes of bankers, and they were formerly called goldsmiths' notes, because the goldsmiths acted as bankers and gave these notes for money deposited with them. They are drawn like bank notes, payable to bearer on demand; and they generally pass as cash, and are legal tender, unless objected to. The use of checks upon deposits has to a great extent superseded them in England. They are so far like ordinary promissory notes that they may be indorsed, and then operate like bills drawn upon the bank. They are not money, like Bank of England notes; and if the bank has stopped payment when they are transferred, the loss is thrown upon the transferrer, unless the transferee, by laches, fails to present them, or to notify the transferrer that they are bad.[4]

§ 1671. The *post notes* of a bank are promissory notes, payable on time, and yet designed to circulate as money. A bank authorized to issue paper for circulation may issue them;[5] and being issued for the purpose of circulating like money, they are subject to the rules which govern ordinary

[1] Gloucester Bank v. Salem Bank, 17 Mass. 1; Id. 33.

[2] See §§ 839, 840, 841, 842, vol. 1, and notes.

[3] F. & M. Bank v. White, 2 Sneed. 482; Greer v. Perkins, 5 Humph. 588; Wright v. Douglas, 3 Barb. 554; Selfridge v. Northampton Bank, 8 Watts & S. 320.

[4] See on this subject Chitty on Bills [*522], 591.

[5] Campbell v. Mississippi Union Bank, 6 How. (Miss) 625.

bank notes payable on demand, rather than to those which govern negotiable promissory notes;[1] and the rules of demand and notice do not apply to them.[2] But it seems that they are entitled to grace like other promissory notes.[3]

SECTION II.

HOW FAR BANK NOTES ARE SIMILAR TO MONEY.

§ 1672. In an early case, it was said by Lord Mansfield that bank notes "are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money—as cash in the ordinary course and transaction of business—by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash, * * * and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes."[4] These remarks, however, could only apply in their full significance to Bank of England notes, which, by statute, take the place of coin; for other bank notes, while in the ordinary transactions of business, take the place of, and are treated as, cash or money,[5] are, nevertheless essentially distinguishable from it.

But they are so far money, in the usual acceptance of the word in common parlance, that they will pass by will be-

[1] Fulton Bank v. Phœnix Bank, 1 Hall, 562.

[2] Key v. Knott, 9 Gill & J. 342.

[3] Sturdy v. Henderson, 4 B. & Ald. 592; Chitty, Jr. 1110; Staples v. Franklin Bank, 1 Met. 43; Perkins v. Franklin Bank, 21 Pick. 483; Edwards on Bills, 522.

[4] Miller v. Race, 1 Burr. 452; Tancil v. Seaton, 28 Grat. 605.

[5] Morrill v. Brown, 15 Pick. 173; Pierson v. Wallace, 2 Eng. (Ark.) 282; Edmunds v. Digges, 1 Grat. 359; Bullard v. Bell, 1 Mason, 243; Bayard v. Shunk, 1 Watts & S. 92; U. S. Bank v. Bank of Georgia, 10 Wheat. 333; Bradley v. Hunt, 5 Gill & J. 58.

queathing testator's money or cash;[1] and it has been said that a sheriff may receive them when current in discharge of an execution.[2] But this does not seem correct; and the officer who takes this responsibility acts at his own risk.[3]

In short, bank notes are not, legally speaking, money, but in a popular sense are often spoken of as money, and are conventionally used in its stead with the like effect.

Thus, it is a settled principle that current bank notes are a lawful tender in payment of debts, unless objected to because they are not money. But if, when tendered in discharge of any contract for the payment of money, the creditor objects to receiving them, because they are not money, the tender is unavailable, and he may insist on payment in the current coin.[4] And when judgment has been obtained for the payment of money, bank notes are not ordinarily so far cash or legal tender that they may be brought into court and tendered in satisfaction.[5]

§ 1673. The difference between bank notes and money is again observable in the cases which maintain that a bill or note payable in bank notes is not negotiable, for its medium of payment has no fixed value.[6] In England, it has been held that a promissory note is not negotiable, even though it be payable in Bank of England notes; but in the United States a note payable in legal tender notes would doubtless be considered negotiable.

By statute in England, and in most of the United States, bank notes may be taken in execution. At common law they could not be; but by custom in this country, it would

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[1] Stuart v. Bute, 11 Ves. 662; Miller v. Race, 1 Burr. 457.

[2] Scott v. Commonwealth, 5 J. J. Marsh. 643; Governor v. Carter, 3 Hawks, 328.

[3] Armsworth v. Scotten, 29 Ind. 495.

[4] Jefferson Co. Bank v. Chapman, 19 Johns. 322; Thomas v. Todd, 6 Hill, 340; Morse on Banking, 397; Wright v. Reed, 3 T. R. 554; Owenson v. Morse, 7 T. R. 64; Codman v. Lubbock, 5 Dowl. & R. 289; Chitty on Bills [*522], 524.

[5] Armsworth v. Scotten, 29 Ind. 495; Hallowell, &c. Bank v. Howard, 13 Mass. 235; Coxe v. State Bank, 3 Halst. 172.

[6] See Chapter I, §§ 55 *et seq.* vol. 1.

seem that the common law has been changed, and that they may be so taken.[1]

§ 1674. Bank notes are negotiable like money, and pass from hand to hand by delivery, possession in itself being sufficient evidence of title. This doctrine was established in the leading case of Miller v. Race,[2] where a bank note, payable to bearer, was stolen from the mail, and on the next day was acquired by the plaintiff for full value, in the usual course of business, and without any notice of the circumstance. The bank clerk detained the note when presented for payment; and it was held that the plaintiff could recover it, because such notes were universally treated as cash, and it was necessary for the purposes of commerce that their currency should be established and secured. These views are now universally entertained. It may be observed also, that while the finder of a bank note acquires no title as against the owner, he has such a possessory interest in it, as to enable him to recover it from a depository, to whom he has confided its care, in the absence of any claim by the rightful owner; but he must show its genuineness, and the value claimed.[3]

SECTION III.

LIABILITY OF TRANSFERRER OF BANK NOTES.

§ 1675. *Transfer warrants genuineness, but not solvency.* —Bank notes being payable to bearer are transferred by mere delivery; and although it has been thought that the transferrer may indorse them, with like effect as the indorsement of other negotiable promissory notes,[4] it would be exceedingly singular to do so, for bank notes are in their nature designed to circulate like money, not upon the credit of the transferrer, but upon their own credit as obligations

[1] Spencer v. Blaisdell, 4 N. H. 198.

[2] 1 Burr. 452.

[3] Tancil v. Seaton, 28 Grat. 601 (1877). See also New York, &c. R. R. Co. v. Haws, 56 N. Y. 175 (1874); Bridges v. Hawkesworth, 7 E. C. L. & Eq. R. 424.

[4] Corbet v. Bank of Smyrna, 2 Harr. (Del.) 235; Thomson on Bills (Wilson's ed.) 123.

redeemable in money at any time. Being used as money, it is quite clear and well settled that the person who transfers a bank note in payment of a debt, or otherwise for value in the course of business, warrants it, in like manner as his transfer imports a warranty of current coin, that is, that it is genuine, and not counterfeit. If it be counterfeit and spurious, it is not what his very act of transfer represents it to be. It is a mere nullity, instead of money or cash; and the debt remains undischarged.[1]

But the party who receives counterfeit bank notes is not without a duty on his part. In order to recover the debt for which they were given in payment, or receive genuine notes in their stead, he must exercise diligence, by giving notice that they are counterfeit, and offering to return them within a reasonable time.[2] And what such reasonable time is must depend upon all the facts and circumstances of each particular case.[3] If the forgery be discovered immediately, the transferrer should be notified immediately; for he may have recourse against some antecedent transferrer, and lose his opportunity of asserting it by delay. A delay by the transferee for six months, after discovering that bank notes were counterfeit, to give notice, has been held unreasonable, and to forfeit his right of restitution;[4] and so a delay from May 25th to the 4th of July following;[5] so a delay for four months, where the parties resided within one hundred miles from each other;[6] and even as short a delay as fifteen days, where a bank received its own notes upon which the name of its president was forged.[7]

§ 1676. *As to the warranty of solvency of the bank*, by the transferrer of its notes, a more difficult question is pre-

[1] Pindall v. N. W. Bank, 7 Leigh, 617; Ramsdale v. Horton, 3 Penn. St. 330; Young v. Adams, 6 Mass. 182; Markle v. Hatfield, 2 Johns. 455; Mudd v. Reeves, 2 H. & J. 368; Edmunds v. Digges, 1 Grat. 359; Eagle Bank v. Smith, 5 Conn. 71; Jones v. Ryde, 5 Taunt. 488; see §§ 731 *et seq.* vol. 1.

[2] See *ante*, § 1371.

[3] Simms v. Clark, 11 Ill. 137.

[4] Raymond v. Baar, 13 Sergt. & R. 318.

[5] Thomas v. Todd, 6 Hill, 340.

[6] Pindall v. N. W. Bank, 7 Leigh, 617.

[7] Gloucester Bank v. Salem Bank, 17 Mass. 44.

sented. The parties may, of course, bind themselves by any express agreement which they may choose to make. If the transferrer represents or warrants that the notes are worth par, he is responsible if it turn out otherwise;[1] and if the transferee stipulates that the risk shall be taken by himself, he cannot recover of the transferrer, if they turn out to be worthless.[2] But when bank notes are offered and received in payment of a prior debt, or in exchange for goods, or other notes, the courts differ as to the implied contract of the parties. Many judges and jurists hold that the risk of the solvency of the bank lies upon the transferrer, upon the ground that the transfer imports that the notes are redeemable on demand at the bank; and that if they are not redeemed because of the bank's insolvency, the transferrer should redeem them himself. And also upon the ground that it is equitable for the loss to fall on the party who held the notes when the loss occurred.[3]

§ 1677. On the other hand, high authorities consider that the transferrer warrants nothing but the genuineness of the bank notes, and that the risk of their value is upon the transferee.[4] And this seems to us the correct view, whether they are transferred in payment of a prior debt,[5] or cotem-

[1] Commonwealth v. Stone, 4 Mete. 43; Corbet v. Bank of Smyrna, 2 Harr. (Del.) 235; Gilman v. Peck, 11 Vt. 516; Aldrich v. Jackson, 5 R. I. 218; Hellings v. Hamilton, 4 Watts & S. 462; Wainwright v. Weber, 11 Vt. 576; Frontier Bank v. Morse, 22 Me. 88.

[2] Story on Promissory Notes, § 389.

[3] Lightbody v. Ontario Bank, 11 Wend. 9; 13 Id. 101; Houghton v. Adams, 18 Barb. 545; Harley v. Thornton, 2 Hill (S. C.) 509; Fogg v. Sawyer, 9 N. H. 365; Gilman v. Peck, 11 Vt. 516; Thomas v. Todd, 6 Hill, 340; Westfall v. Braley, 10 Ohio St. 188; Frontier Bank v. Morse, 22 Me. 88; Townsends v. Bank of Racine, 7 Wisc. 185; 2 Parsons N. & B. 102–105, 191–195, 197.

[4] Bayard v. Shunk, 1 Watts & S. 92; Edmunds v. Digges, 1 Grat. 359; Lowery v. Murrell, 2 Port. (Ala.) 286; Corbet v. Bank of Smyrna, 2 Harr. (Del.) 235; Ware v. Street, 2 Head, 609; 3 Head; Scruggs v. Gass, 8 Yerg. 175; Morse on Banking, 421, 422; see *ante*, §§ 737 *et seq.* vol. 1.

[5] Bayard v. Shunk, 1 Watts & S. 92. In this case the plaintiff's attorney received bank notes in payment of a judgment; both parties being ignorant of the failure of the bank which occurred several days previous. The notes were worthless, but the payment was held good, Gibson, C. J., saying: "The assertion

that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no further than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of the whole communities at their nominal value when notoriously below it. But why hold a payor responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterward? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse, with the seeds of mortal disease in him, might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, although not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the meantime; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not solvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers would more than counterbalance the good to be done by hindering the crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

"The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential, existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a dead horse is a living one; and it is an elementary principle that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note holders and depositors; and even

porancously in exchange for goods or other bank notes.[1] When they are offered in payment, they are offered (and if received, receipted for) as money or cash. And the transferee takes them of his own free will, and with his eyes open. If he does not choose to take them, he may refuse to do so, or he may require that their payment shall be guaranteed. And if, under such circumstances, he receives them unconditionally, we can perceive no more propriety in allowing him to return them, if the bank is totally or partially insolvent, than in allowing the purchaser of goods to return them, and demand back his money or cash, when it turns out that their market price was much less than the price he paid, or that they were in fact without any market value at all.

§ 1678. There is properly excepted from these conclusions all cases in which the transferrer knows of the insolvency of

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where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But, independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel." Lowrey v. Murrell, 2 Port. (Ala.) 280.

[1] In Edmunds v. Digges, 1 Grat. 359, it appeared that Digges, the sheriff of Fauquier County, Virginia, was starting to Richmond to deposit $400, in notes of the Virginia banks, when Edmunds applied to him to exchange them for the same amount, in notes of the Mechanics' Bank of Alexandria. Digges first objected, but finally consented. On that very day the Mechanics' bank stopped payment. It was held that Digges could not recover from Edmunds, but must bear the loss, and said Baldwin, J.: "The court is of opinion that there is no implied warranty of the value of the current money of the country, passing from hand to hand in the course of trade, commerce and business. This is true, not only of the money made by law a good tender in the payment of debts, and performance of contracts, but is equally so in regard to the notes of banks and bankers, payable to bearer, and circulated by delivery. These are not merely the representative of money, but in the course of business and by common usage, are substantially employed and treated by most persons as actual money or cash. * * Those who circulate them are not understood as thereby giving any assurance of the credit, punctuality or solvency of the makers, in regard to all of which the receiver exercises his own judgment, or relies upon that of others in whom he has confidence. There is but a single guaranty which those who circulate the money of that or any other kind can be understood to give, to wit, that it is what it purports to be, genuine, and not counterfeit."

the bank at the time of the transfer, and the transferee does not. And this exception does not arise from the contract of the parties, but is rather referable to considerations of fraud. To conceal from the transferee that the notes are wholly or partially worthless, when they are passed as money, would be in violation of good faith and fair dealing, and the transferee would justly be entitled to recover against the transferrer.[1] But in all other cases, the conclusion that the risk is upon the transferee seems to us clearly logical, and any other involves inextricable complications. The bank may be deemed insolvent, and yet may finally redeem its notes at par; or it may be only partially insolvent, and redeem them in part. Such cases differ essentially from the transfer of forged notes and counterfeit coin, which are nullities; for while it is true that the metal of counterfeit coin has, as has been suggested, some value,[2] such bogus currency never has any legal value as currency, whereas all genuine bank notes generally have some value as bank notes.[3] Nor is payment in bank notes analogous to payment in the promissory notes of an individual payable in future. The latter, when passed without indorsement for an antecedent debt, are regarded by some authorities as conditional payment only, and if not paid, they hold that the debt revives. Even if this be correct (and we think otherwise),[4] it is because they are not offered as cash, or its representative.[5] But bank notes are presumed to be offered as cash, and are legal tender unless objected to; and for this reason the very opposite presumption, that they were received in absolute payment, would arise.

§ 1679. Where the view obtains that the transferrer warrants the solvency of the bank which issued the note, that warranty is not regarded as so absolute and unconditional as

[1] Thomson on Bills (Wilson's ed.), 123; Camidge v. Allenby, 6 B. & C. 373; 9 Dow. & R. 391; Penn v. Harrison, 3 T. R. 759. See Chapter XXII, on Transfer by Assignment, § 736, vol. 1.

[2] Fogg v. Sawyer, 9 N. H. 365, Parker, C. J.; 2 Parsons N. & B. 193, note m.

[3] Bayard v. Shunk, 1 Watts & S. 92, Gibson, C. J.

[4] See § 740, vol. 1.

[5] Ibid.

to require no duty on the part of the transferee. If, for instance, the note would have been paid if punctually presented after the transfer, but the holder neglected for a considerable time to present it, and when he finally did so, the bank had failed, the loss would then fall on the transferee, who, by diligence, might have prevented it. The principle is, that the transferee must either put the note in circulation, or he must present it within a reasonable time at the counter of the bank, and notify the transferrer within a reasonable time if, by reason of insolvency, it is not paid; and what is "reasonable time" is a question for the court to determine under all the circumstances of the case.[1]

In England, the view is taken that if the bank be insolvent at the time of transfer, the loss is upon the transferrer; but the transferee must, in order to recover, present the notes at the bank immediately, or pass them off in circulation.[2]

SECTION IV.

RIGHTS, DUTIES AND REMEDIES OF THE HOLDER OR OWNER OF BANK NOTES.

§ 1680. Mere possession being sufficient *prima facie* evidence of *bona fide* ownership for value of a bank note, the holder may enforce its payment, unless his position as a *bona*

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[1] Camidge v. Allenby, 6 B. & C. 373; 6 Dow. & R. 39, Bayley, J., saying: "Then the question is, what was the duty of the plaintiff to do in order to obtain payment of these notes (bankers' cash notes). They were intended for circulation. But I think that he was not bound immediately to circulate them, or send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded that, if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on Monday" (the next business day after they were received). * * * "If presentment was unnecessary, he (the holder) had another duty to perform. * * * The law requires that the party on whom the loss is to be thrown shall have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note." 2 Parsons N. & B. 197.

[2] Owenson v. Morse, 7 T. R. 64; Beeching v. Gower, Holt N. P. 313; Ward

fide holder be successfully combated. It will not be a sufficient defense to show that the holder was negligent in inquiry when he received it, and that he took it under circumstances which would excite the suspicions of a man of ordinary prudence.[1] In the cases of bills of exchange and negotiable promissory notes the same principle prevails; but when it is shown that such a bill or note was lost or stolen, or obtained by fraud or felony, the burden of proof is shifted upon the holder, who must show in answer that he acquired it *bona fide* in the usual course of business, and without notice.[2] But in favor of the holder of a bank note the law goes a step further, and to exonerate him from any such burden. And he can rest secure in its possession, as the evi-

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v. Evans, 12 Mod. 521; Camidge v. Allenby, 6 B. & C. 373; Timmins v. Gibbons, 18 Q. B. 722; 14 E. L. & Eq. 64; Rogers v. Langford, 1 Cromp. & M. 637; Turner v. Stones, 1 Dow. & L. 122. The plaintiff in this case changed, late on Saturday, a £5 note for defendant. The bank had then virtually stopped payment. *Held*, that the loss was the transferrer's.

In England, this question has been presented in cases of bankers' cash notes, which differ from ordinary bank notes; and a distinction has been taken by Bayley, J., in Camidge v. Allenby, 6 B. & C. 373, between prior and cotemporaneous debts. Corn was sold to defendant on the morning of September 10th; and in the afternoon the bankers' cash notes were delivered, and proved bad, the bank having stopped payment. Bayley, J., said: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have no remedy upon them against the defendant. The plaintiff might have insisted on payment in money. But if he consented to receive them as money, they would have been taken by him at his peril. Here the notes were given to him in payment subsequently, and the question is whether they operate as a discharge of the debt due to the plaintiff." The case seems to have been decided on the ground of laches in reporting that the notes were bad. But this distinction was not assented to. The other judges considering that, if the notes were money, they were payment; if common promissory notes, there was negligence. And Littledale, J., said: "I think that there is no guaranty implied by law in the party passing a note payable on demand to bearer that the maker is solvent at the time when it is so passed." Lord Campbell, in Timmins v. Gibbons, 18 Q. B. 722, says he could never see any distinction between the cases of prior and cotemporaneous debts, for even in payments over the counter some time must elapse between the debt and payment, which makes the debt a precedent one.

[1] Raphael v. Bank of England, 17 C. B. 161; 33 E. L. & Eq. 276; Solomons v. Bank of England, 13 East, 135; Lowndes v. Anderson, 13 East, 130; City Bank v. Farmers' Bank, Taney C. C. Dec. 119.

[2] See §§ 810 *et seq.* vol. 1.

dence of his right to recover, until the defendant shows that he was in privity with the fraud, or acquired the note *mala fide*, or with notice.

This distinction between bank notes and other negotiable instruments is not admitted in England;[1] but in the United States it is upheld by high authority,[2] and seems to us clearly the correct doctrine. Bank notes pass as cash, and are seldom identified by any peculiar earmarks; and it is next to impossible for a trader to remember where, or when, or from whom, or for what consideration, he received any particular bank notes in his cash drawer. And to require him to do so would be an intolerable burden.

The holder is, in fact, regarded as in effect the original promisee of the bank, and not as taking by assignment only the title of the transferrer; and a payment to him by the bank will discharge the debt, unless it knows, or has reason to know, that he acquired the note by fraud,[3] or with notice of fraud on the part of his transferrer, which equally impeaches his title.[4]

§ 1681. The bill holder, in order to enjoy the full privileges of a *bona fide* holder for value, must have acquired the bills in the usual course of business; and if they have been pledged to him as collateral security by the bank, with the understanding that they are not to be put in circulation, they are not currency, and the holder stands merely in the position of an ordinary creditor.[5]

The holders of bank notes have no preference to the assets of the bank over other creditors, unless it be accorded

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[1] De La Chaumette v. Bank of England, 9 B. & C. 208, where it was held that the holder of a bank note which had been stolen must show that he had given value for it. See also Solomons v. Bank of England, 13 East, 135.

[2] Worcester Co. Bank v. Dorchester, &c. Bank, 10 Cush. 488; Wyer v. Dorchester, &c. Bank, 11 Cush. 51; Louisiana Bank v. Bank U. S. 9 Mart. (La.) 398. See Crawford v. Royal Bank, Ross Lead. Cas. 229; Morse on Banking, 416; 2 Parsons N. & B. 93, 281–283.

[3] New Hope, &c. Bridge Co. v. Perry, 11 Ill. 467.

[4] Olmstead v. Winstead Bank, 32 Conn. 278.

[5] Davenport v. City Bank, 9 Paige, 12.

them by statute;[1] but this is sometimes done in order to stimulate their credit as a circulating medium.[2] But, in other cases, statutes specially provide that all creditors not having specific liens shall stand on the same footing and share the assets ratably.[3]

§ 1682. *Amount of recovery.*—The holder is entitled to recover of the bank the full amount of the bank note, or to receive a proportionate share of its assets, without regard to the amount which he gave for it.[4] Such seems to be the accepted doctrine and true principle of the question, in the absence of any statutory provision. But the view has been taken, in allotting the assets of an insolvent bank, that the bill holders should receive amounts proportioned to the sums actually paid for the bills.[5]

The holder may also be entitled to recover interest. But interest does not run upon bank notes from their date,[6] which we have already seen is not a true index of the time at which they were issued; but only from the time at which demand of payment was made at the banking house, or other place, if it were specified. For then alone did the bank become in default.[7] Such is the current of authority, and it matters not that the note is not expressed to be payable "with interest;"[8] but it has been held that interest runs from the date of suspense of specie payments when a bank has failed.[9] Incidental damages are not allowed.[10]

§ 1683. *Bank notes do not become overdue.*—Bank notes do not grow stale by mere lapse of time, as do other species of negotiable instruments. Indeed, it is generally to the in-

[1] Cochituate Bank v. Colt, 1 Gray, 382. [2] Morse on Banking, 418.

[3] Robinson v. Gardiner, 18 Grat. 509; Exchange Bank v. Knox, 19 Grat. 739.

[4] Robinson v. Beall, 26 Ga. 17; Morse on Banking, 398.

[5] Griffin v. Central Bank, 3 Kelly, 371; Collins v. Central Bank, 1 Kelly, 435.

[6] Ringo v. Trustees, 8 Eng. 583.

[7] Bank of Kentucky v. Thornsberry, 3 B. Mon. 519; Bank Commissioners v. Lafayette Bank, 4 Edw. Ch. 287.

[8] Estate Bank of Pennsylvania, 60 Penn. St. 471.

[9] Atwood v. Bank of Chillicothe, 10 Ohio, 526.

[10] Bank of St. Mary's v. St. John, 25 Ala. 566.

terest of the bank that they should remain in circulation, and they are designed for the very purpose of being a continuing circulating medium. Therefore, they do not become overdue or liable to any equities between the bank and subsequent holders, but the bank is absolutely bound to pay them on presentment by the bearer at any distance of time.[1] They are not barred (in general), like ordinary promissory notes, by statutes of limitation.[2] And they are not *functi officio* when once redeemed by the bank, but, unlike ordinary promissory notes, are designed to be re-issued again and again.[3] These seem to us correct doctrines, and are sustained by the authorities cited. But it has been held that bank notes may be protested for non-payment, and that a party acquiring them after dishonor, whether he knows of the dishonor or not, is subject to equities.[4]

§ 1684. While the general rule is that statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business, considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned to and re-issued by the bank; yet if the bills have ceased to circulate as currency, and have ceased to be taken in and re-issued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the statutes of limitation.[5]

§ 1685. *Presentment and demand.*—Ordinarily the debtor must seek his creditor, and pay the debt; and if he does not, the latter may sue without any previous demand, the suit being deemed in itself a demand. The same principle prevails as to bank notes, which are generally made payable at the counter of the bank, or some one of its branches, at specified places; but if the bank tenders the amount in court, and

[1] Bullard v. Bell, 1 Mason, 243; Solomons v. Bank of England, 13 East, 135.

[2] 2 Parsons N. & B. 95; Morse on Banking, 402.

[3] 2 Parsons N. & B. 95.

[4] Burroughs v. Bank of Charlotte, 70 N. C. 284.

[5] Kimbro v. Bank of Fulton, 49 Ga. 419.

shows that it was ready and willing to have paid at the place named, then it is not liable for interest or costs.[1] There is authority, however, for the doctrine that demand at the place named must be averred and proved to sustain a suit on a bank note.[2] When no place of payment is specified in the bank note, the demand should be made at the bank, where it is to be presumed that provision has been made for its payment; but if another place be specified, demand should be made there, and not at the bank.[3]

Demand should be made during the usual hours of business, according to the custom of banks; for at their termination the bank has a right to close its doors. But if bills were presented just before the end of business hours for redemption, the bank could not excuse itself by showing that there were so many that the transaction could not have been completed before the closing hour arrived.[4]

§ 1686. Each bank note being a separate debt, the bank may treat it as such in determining in what description and denominations of coin payment may be legally tendered;[5] but the notes may be presented in packages by the holder, it not being necessary that he should make separate presentment of each note.[6] The demand being made, it is the duty of the bank to respond to it with reasonable promptness, without employing devices, such as the slow and minute inspection of each bill, or other unnecessary formalities to secure delay; and if it be evident that such means are used to delay or evade payment, the bank will be regarded as having refused payment.[7]

[1] Haxtun v. Bishop, 3 Wend. 13; Bank of Niagara v. McCracken, 18 Johns. 495; Bryant v. Damariscotta Bank, 18 Me. 240; Caldwell v. Cassidy, 8 Cow. 271; State Bank v. Van Horn, 1 South. 382.

[2] Doughty v. Western Bank, 13 Ga. 287. In Kentucky it must be made, but need not be averred. Bank of Ky. v. Hickey, 4 Littell, 225.

[3] King v. Dedham Bank, 15 Mass. 447; Ware v. Street, 2 Head, 609.

[4] Suffolk Bank v. Lincoln Bank, 3 Mason, 1; People v. State Treasurer, 24 Ill. 433.

[5] Boatman's Sav. Inst. v. Bank of Missouri, 33 Mo. 497.

[6] Reaper's Bank v. Williard, 24 Ill. 433.

[7] Ibid.; People v. State Treasurer, 4 Mich. 27; Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

§ 1687. Trover will lie against the finder of bank notes by the owner.[1] But assumpsit will not lie against the finder for money had and received, unless the bank notes found have been turned into money.[2] In England it has been held that assumpsit will lie for country bank notes and checks even, which have been treated like money.[3] And when money may be presumed to have been actually received upon negotiable notes, or other securities, the action of assumpsit may in general be maintained.[4] The identity of the note must be clearly made out.[5] If the finder has passed the note to a *bona fide* transferee for value, the owner cannot recover against such transferee.[6]

§ 1688. If a bank receive in payment or on deposit counterfeit bank notes purporting to be of its own issue, the person who innocently pays or deposits them is not liable.[7] "The true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply to all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other, whether they are his notes or not; and if he pays them or receives them in payment, and continues silent after he has sufficient opportunity to examine

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[1] Noyes v. Price, Chitty on Bills [*521], 593; Mason v. Warte, 17 Mass. 560; 2 Parsons N. & B. 93, note.

[2] Airslie v. Wilson, 7 Cow. 662; Kellogg v. Budlong, 7 How. (Miss.) 340; Houx v. Russell, 10 Mo. 246; Muir v. Rand, 2 Ind. 291; Murray v. Pate, 6 Dana, 335; Mason v. Waite, 17 Mass. 560; Arms v. Ashley, 4 Pick. 71.

[3] Spratt v. Hobhouse, 4 Bing. 173; 12 J. B. Moore, 395; Pickard v. Bankes, 13 East, 20. Perhaps the receipt of their value may be presumed. Longchamp v. Denny, 1 Doug. 137.

[4] Spratt v. Hobhouse, *supra*; M'Lachlan v. Evans, 1 Yonge & J. 380; Hatten v. Robinson, 4 Blackf. 479; Tuttle v. Mayo, 7 Johns. 132; Muir v. Rand, 2 Ind. 291.

[5] Miller v. Race, 1 Burr. 452.

[6] Miller v. Race, 1 Burr. 452; Anon. 1 Salkeld, 162.

[7] U. S. Bank v. Bank of Georgia, 10 Wheat. 333.

them, he should be considered as having adopted them as his own."[1]

SECTION V.

PAYMENT IN BANK NOTES, AND SET-OFF.

§ 1689. Nothing but money being a positive legal tender, bank notes are not by the common law a valid tender, even in payment of debts due to the bank itself, by their holder.[2] But by statute in many of the States, the banks are required to receive their own notes in payment.[3] But although a statute may require that the bank shall receive its notes in payment of debts due to it, yet if the bank make an assignment to trustees of all its debts and assets for the equal benefit of its creditors, the weight of authority is to the effect that bank notes acquired after and with notice of the assignment, are not a valid tender to the assignee. The statute, as it is said, no longer applies, for the debt is then not due to the bank, but to the assignee.[4] But the contrary view has been taken in some cases, and impressed with a force of logic which seems to us unanswerable.[5]

[1] Gloucester Bank v. Salem Bank, 17 Mass. 133.

[2] Coxe v. State Bank, 3 Halst. 172; Hallowell, &c. Bank v. Howard, 13 Mass. 235; Suffolk Bank v. Lincoln Bank, 3 Mason, 1; Morse on Banking, 397; 2 Parsons N. & B. 91.

[3] Exchange Bank v. Knox, 19 Grat. 746; Niagara Bank v. Roosevelt, 9 Cow. 409; Moise v. Chapman, 24 Geo. 249; Dunlap v. Smith, 12 Ill. 399; Union Bank v. Ellicott, 6 Gill & J. 363.

[4] Exchange Bank v. Knox, 19 Grat. 746; Housum v. Rogers, 40 Penn.; Saunders v. White, 20 Grat. 327; Farmer's Bank v. Goddin, 19 Grat. 739.

[5] Blount v. Windley, 68 N. C. 2 (1873). In 1866, the assets of the Bank of Washington were placed by order of court in the hands of a commissioner for the benefit of creditors. The commissioner Blount obtained judgment against Reddett, and Windley as his surety, for $1,735 50, and execution issued. Windley, subsequent to issue of execution, obtained bills of the bank, and tendered them in payment. It was held a good tender; that the bank was bound by the very fact of issuing a currency to receive it in payment; that the legislature could not deprive the holder of this right, which was part of the obligation of the contract of the bank, nor could the bank deprive him of it by an assignment of its effects. The Court said, in the course of its opinion, per Pearson, C. J., that it would not "enter into a consideration of the point in respect to the law of set-

§ 1690. The time when the bank is compellable to receive its own notes in payment, or to allow them as assets, ceases, according to the view of Mr. Morse, a discriminating writer,[1] when the note ceases to pass as current money, and are only subjects of traffic on special terms. And this criterion is supported by strong considerations; for the holder who receives them under such circumstances is conscious, from the mere fact of their depreciated value, that the bank is not regarded as solvent. Where the bank has closed its doors, and suspended business altogether, it is clear that the taker of its notes, with knowledge of such circumstances, could not avail of them as tender or as offsets;[2] but it has been held that the mere suspension of specie payments would not have the like effect, as it might indicate a mere temporary embarrassment, and not an absolute deficiency of assets.[3] When there has been an assignment made by the bank to trustees, the taker, with knowledge thereof, could not, as we have already seen by some authorities, plead the notes as offsets, or tender them in payment.[4]

§ 1691. As long as a bank is solvent there is no doubt that a debtor is entitled to plead as offsets any of its notes of which he is the holder, according to principle, and to the weight of adjudicated cases,[5] although the contrary view has been taken in Massachusetts, where it has been held that the debtor must get a judgment against the bank on his bills

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off, whether the defendant must hold the 'mutual demand,' at the time of the assignment, or at the commencement of the action, or at the time of plea pleaded, or at the trial; for ours is not a question of set-off, but a question as to the right of a bill holder to use the bills of the bank as a legal tender, equivalent to gold and silver coin, in satisfaction of a debt due to the bank." "The neglect of advertence to those diversities is the cause, as it seems to us, of the obscurity and confusion in which the question is involved in many of the cases. See Exchange Bank of Virginia, for Camp, Trustee v. Knox, 19 Grat. 739; 3 Wend. 13; 8 Watts & Serg. 311; 1 Ohio, 381. It certainly is the main fallacy of the very labored argument of the plaintiff's counsel in this case." Bank of Charlotte v. Hart, 67 N. C. 264; Exchange Bank v. Tiddy, 67 N. C. 169.

[1] Morse on Banking, 401, 402. [2] Diven v. Phelps, 34 Barb. 224.

[3] Jefferson Co. Bank v. Chapman, 19 Johns. 322. [4] *Ante*, § 1689.

[5] Exchange Bank v. Knox, 19 Grat. 746.

before he can avail himself of them as set-off.[1] When the bank is insolvent, the note holder can set off the amount of notes held by him for their full face value, provided he came into possession of them prior to the insolvency.[2] And it is said that he may do this as long as the bank has control of its assets. As a general rule, however, it is considered that when a bank has become insolvent, and especially if it has made an assignment to trustees for the benefit of all its creditors, or a receiver has been appointed by court to take them in charge, its assets are regarded as being appropriated for *pro rata* distribution amongst them; and bank notes acquired after such assignment, or appointment of a receiver, cannot be pleaded as offsets, for the reason that the assignees are *bona fide* holders of the subject in controversy for the purpose of making such distribution, and to allow offsets would create preferences.[3]

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[1] Hallowell, &c. Bank v. Howard, 13 Mass. 235.

[2] Exchange Bank v. Knox, 19 Grat. 746; Diven v. Phelps, 34 Barb. 224; Haxtun v. Bishop, 3 Wend. 13; Bruyn v. Receiver, 9 Cow. 413, note; Clarke v. Hawkins, 5 R. I. 219; *ante*, § 1689.

[3] Finney v. Bennett, 27 Grat. 379; Exchange Bank v. Knox, 19 Grat. 746. In this case it appeared that by act of the Virginia General Assembly of February 12th, 1866, the banks of the State, being insolvent, were required to go into liquidation and to execute deeds conveying all their property, including debts, to trustees for the payment of their debts. It was held (1) that the act forbade all preferences of creditors; (2) that although the charters of the banks required them to take their notes in payment of debts due them, this did not authorize debtors of the bank to pay their debts with notes of the bank bought up after execution, and the recordation of the deeds; and (3) that a debtor of the bank could not set off notes of the bank bought up by him after execution, and recordation of the deed, and notice thereof to the creditor. Christian, J., delivering the opinion of the court, said: "It must not be forgotten that when, in conformity with the act of February, 1866, those banks executed their respective deeds of assignment, they had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was simply impossible. The stockholders had no longer any interest in them. It only remained to wind them up for the benefit of their creditors. Robinson v. Gardiner, 18 Grat. 509. In this view the grantees in said deeds were not trustees for the banks, but for the creditors only. Haxtun v. Bishop, 3 Wend. 13; Diven v. Phelps, 34 Barb. 224. The true principle I conceive to be this: These corporations being insolvent under the statute, and the deeds made in pursuance thereof, the rights of all the creditors attach equally to all their assets, and whoever takes their bills afterward (being indebted to such corporations) takes them subject to

§ 1692. When the note is payable in bank bills, the holder is entitled to recover its face value;[1] but judgment and execution should express the fact that a payment in the notes of the bank will discharge it, inasmuch as process for money could not be so satisfied.[2]

SECTION VI.

LOST OR DESTROYED BANK NOTES.

§ 1693. When the whole or part of a bank note has been lost or destroyed, the rights of the owner are purely of an equitable nature. The contract of the bank is to pay the amount upon surrender of the note, and when the rightful

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the right of all the creditors to share equally in their assets. His claim is upon the assets for his proportionate share. The statute, as well as the deeds of assignment, virtually secures to the creditors collectively the entire and exclusive right to all the assets. The debtor, therefore, must pay his debt and take his dividend for his claim arising from his ownership of the bills acquired under such circumstances. It is true that a bank, as long as it is solvent, or rather as long as it has control of its assets, is bound to take its own bills in payment of debts due to it. But when it becomes insolvent and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligation against him for the equal benefit of all. Diven v. Phelps, 34 Barb. 224; 9 Cow. 408, notes; 1 Paige, 585; 3 Wend. 13. But independently of the act of February 12th, 1866, the obligation enforced, and the rights established under it, according to the construction I have given it, it must be conceded on general principles that these notes of the banks, acquired after notice of the assignment, cannot be pleaded as set-offs in actions brought by the assignees of banks, unless the cases are taken out of the operation of the general and well-settled principles of law, in consequence of the provisions of the charters of these corporations, or of the general law regulating them. To this question I shall advert presently.

"It is a principle of law, too well settled to admit of doubt or argument now, that a set-off, as between original parties, acquired after the assignment for a *bona fide* purpose of the subject in controversy and notice thereof, cannot be set off against a holder for value."

See also Farmers' Bank v. Goddin, 19 Grat. 739; Saunders v. White, 20 Grat. 327; Finney v. Bennett, 27 Grat. 379; Haxtun v. Bishop, 3 Wend. 13; Bank of Niagara v. Roosevelt, 9 Cow. 409; 1 Hopk. Ch. 579.

[1] Abbott v. Agricultural Bank, 11 Smedes & M. 405.

[2] Morse on Banking, 403.

owner cannot comply with that condition, his claim can only address itself to equitable considerations. And in order to do justice, the courts will only permit him to recover when he can assure the bank against the possibility of a demand of payment by some one else, as securely as if he himself were to surrender the note.

(1) *When the whole note has been lost*, it is obvious that the owner cannot place himself within this rule. It is payable to bearer on demand, and passing by delivery, it may at once be found by some one else, and be again put in circulation. The owner cannot frame a clearly sufficient indemnity against its payment by the bank; for even though he be able to identify it by its number or other mark, the bank would still be bound to pay it to a *bona fide* holder who gave value for it, without notice of the loss. And a notice of the loss, even though published in the newspapers, would be unlikely to reach the general public; and it would be difficult, indeed next to impossible, to show that it reached a particular person. For these reasons, one who loses the whole of a bank note must bear the loss, and is without remedy against the bank.[1]

§ 1694. (2) *When the whole note has been destroyed*, it is obvious that the bank incurs no danger, as in the case of its loss, of paying it to another party. And, therefore, when the true owner produces clear proof of the destruction of a particular bank note, he is permitted to recover the amount of the original indebtedness from the bank. It will be necessary, however, that the owner should accurately identify the particular notes destroyed. It will not do to show that notes of a certain amount were destroyed, for this would not identify them, or enable the bank to protect itself by taking a bond of indemnity against their future appearance, in the event that the destruction was not fully accomplished.[2]

[1] Hinsdale v. Bank of Orange, 6 Wend. 378. But see, *contra*, Waters v. Bank of Georgia, Charlt. 193; Robinson v. Bank of Darien, 18 Ga. 65. See also 2 Parsons N. & B. 308.

[2] Tower v. Appleton, 3 Allen, 387; Carey v. Green, 7 Ga. 79.

This bond of indemnity is usually required, even where there is distinct proof of destruction of specific notes, out of an abundance of caution to prevent imposition upon banks, which generally are without the means of disproving the destruction of the notes.[1] But there is authority to the effect that in such cases it is needless.[2]

§ 1695. *When part of a bank note has been lost.*—It has been held, in a number of cases, that when half of a bank note has been lost, no action at law can be maintained upon the returned half, but that suit must be brought in equity to establish the facts; and that then a bond of indemnity "to secure the bank against future loss from the appearance and setting up of the other half of such note.[3] And Judge Story concurs in this view.[4] In others, it has been held that action at law may be maintained, the court having power to require a bond of indemnity, which, in such a case, is deemed necessary.[5] But Prof. Parsons says, as to the view that an indemnity is necessary, "from this conclusion, unless it be so directed by statute provision, we must dissent. For the payor will never be liable again, since the holder takes the missing half with notice of prior equities, and therefore no indemnity should be required."[6] Of course, if no indemnity were requisite, there could be no objection to an action at law. Payment in such an action would be a good plea against an action on the other half, as the holder would take it subject to any such defense; and the cases sustaining Prof. Parson's view, which are quoted below, seem to us correct.[7]

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[1] Wade v. N. O. Canal, &c. Co. 8 Rob. (La.) 142 (1844); Morse on Banking, 410. The same rule is applied to a certificate of deposit. Welton v. Adams, 4 Cal. 38.

[2] Bank of Mobile v. Meagher, 33 Ala. 622.

[3] Bank of Virginia v. Ward, 6 Munf. 169 (1818); Farmers' Bank v. Reynolds, 4 Rand. 186 (1826).

[4] Story on Bills, § 448.

[5] Commercial Bank v. Benedict, 18 B. Mon. 311.

[6] 2 Parsons N. & B. 313. See Byles (Sharswood's ed.) [*365], 543.

[7] Union Bank v. Warren, 4 Sneed, 171 (1856); Hinsdale v. Bank of Orange, 6 Wend. 379 (1831); Patten v. State Bank, 2 Nott & M'Cord, 464 (1820). In Bullet v. Bank of Pennsylvania, 2 Wash. C. C. R. 172 (1808), there was an action

Lord Ellenborough held the contrary doctrine;[1] but his decision has been criticised as "an Homeric nod."[2]

§ 1696. To guard against the loss of bank notes sent by mail, the sender often cuts them in halves, and transmits the halves by different mails. This plan is practiced both in England and the United States, and, according to the principles of the text, is one which secures the true owner against loss.[3] He is entitled to recover when he shows himself entitled to both halves; and the bank cannot escape its responsibility by publishing notice that it will not be liable upon severed notes.

It has been said of such a notice: "It is as extraordinary as it is novel, and is probably the first instance of a debtor's undertaking to prescribe terms to his creditors."[4]

But courts of equity, notwithstanding the plaintiff may

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at law on half of a bank note, the other half being lost. The plaintiff offered indemnity. The court held that, as the holder of the other half would take it subject to equities, the recovery could be had, taking no notice in its opinion of the indemnity offered. This view was re-affirmed in Martin v. Bank of U. S. 4 Wash. C. C. R. 253 (1821), and applied, although the bank had given notice previously that, in such cases, they would not pay unless both parts were produced. See *ante*, § 1479.

[1] Mayor v. Johnson, 3 Camp. 325 (1812), Nisi Prius.

[2] Bank U. S. v. Sill, 5 Conn. 112 (1823). In this case action at law was brought on a half note, the other half having been lost. It does not appear that any indemnity was offered. Peters, J., said: "The case of Mayor v. Johnson, 3 Camp. 324, is directly in point. In that case judgment was rendered for the defendant, by Lord Ellenborough, on the ground that the lost half of a bank bill was negotiable, and would enable a *bona fide* holder to recover of the bank; which, with all due deference to an illustrious judge, I am bound to say, is not law. As well might a vignette, or any other fragment torn from a bill, be considered negotiable. The only apology I can make for his lordship is, that he was on the circuit, where business is done in haste, without time and means for investigation and consideration, and where the greatest judges frequently err. '*Quandoque bonus dormitat Homerus.*'"

[3] Chitty on Bills [*259], 294; Morse on Banking, 415; 2 Parsons N. & B. 314; Williams v. Smith, 2 B. & Ald. 496; Commercial Bank v. Benedict, 18 B. Mon. 307; Redmayne v. Burton, 9 C. B. N. S., quoted in 2 Parsons N. & B. 313, note k.

[4] U. S. Bank v. Sill, 5 Conn. 106; Martin v. Bank U. S. 4 Wash. C. C. 253; 2 Parsons N. & B. 314.

have an action at law, still entertain jurisdiction of suits on half bank notes.[1]

§ 1697. The owner in these cases, it has been said, "does not recover in consequence of holding the half merely; but he must also satisfy the bank of the verity of the facts necessary to his case, that is, of the severance, the transmission by mail, and the loss, or else he must establish them by a judgment of the court. And, furthermore, the half notes sued on must be specifically and satisfactorily identified as the counterpart of the halves transmitted, or no recovery will be had.[2]

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[1] Allen v. State Bank, 1 Dev. & Bat. Eq. 3 (1834), Gaston, J. See *ante*, § 1479.

[2] 2 Parsons N. & B. 313: Bank of Va. v. Ward, 6 Munf. 166.

CHAPTER LI.

CERTIFICATES OF DEPOSIT.

SECTION I.

DEFINITION, ORIGIN AND NATURE OF CERTIFICATES OF DEPOSIT.

§ 1698. *Definition.*—A certificate of deposit is a receipt of a bank or banker for a certain sum of money received upon deposit, and it is generally framed in such a form as to constitute a promissory note, payable to the depositor, or to the depositor or order, or to bearer.

It appears to have been at an early day the practice of the goldsmiths in England, who generally engaged in the business of banking, to give receipts to their customers for moneys deposited with them, in the form of promissory notes payable to the bearer on demand, or to the depositor or order.[1] And the statute of Anne placed them, as other promissory notes, on the same footing as bills of exchange.[2] Thus originated the instrument now so commonly used, and called a certificate of deposit, which is, in short, generally a promissory note for the payment of an amount which it certifies to be deposited in bank. Such at least is our idea of its origin. Certainly it closely resembles the receipt given by the goldsmiths to their customers, and which was called a banker's cash note. Mr. Chitty says of such receipts: "They appear originally to have been given by bankers to their customers, as acknowledgments for having received money for their use," and that "in point of form they are similar to common promissory notes, and are stated in pleading as such."

[1] Nicholson v. Sedgwick, 1 Ld. Raym. 180; 3 Salk. 67 (1698); Thomson on Bills (Wilson's ed.), 124; Chitty (13 Am. ed.) [*522], 591; Byles [*10], 81.

[2] 3 & 4 Anne, ch. 9.

Also he says, "at present cash notes are seldom made except by country bankers, their use having been superseded by the introduction of checks."

Now, when the depositor desires to have his funds ready to check on at any moment, he takes no certificate of deposit, but uses his own check as the mode of transfer. But when he wishes his funds to be running on interest, and to remain for any extended period in bank, he usually takes a certificate of deposit, which is the bank's receipt, payable at a future day, or on demand, or upon ten days' notice, as the case may be. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass book, is intended to represent moneys actually left with the bank for safe-keeping, which are to be retained until the depositor actually demands them. And it is not dishonored until presented.[1]

§ 1699. As to the power of banks to issue certificates of deposit, it is observed by Mr. Morse that "if a bank cannot issue its negotiable promissory note, neither can it issue a negotiable certificate of deposit of this description"—that is, payable otherwise than on demand. "If the note would be void, so likewise is the certificate. If, however, the bank is empowered to issue promissory notes, subject only to the restriction that it shall issue none which are designed to pass into circulation as currency, but only such as become necessary in the ordinary course and conduct of its affairs, and are strictly business paper, then it may issue certificates of deposit, whether payable on demand or otherwise, subject only to the same restrictions."[2]

In New York, where the statute law pronounced a draft or note issued by a bank payable at a certain time after date to be void, it was held that a certificate of deposit payable to the order of a particular person six months after date

[1] National Bank of Fort Edward v. Washington County National Bank, 12 N. Y. S. C. (5 Hun), 605.

[2] Morse on Banking, 53.

came within its prohibition and was void.[1] And it would not be valid even in the hands of a *bona fide* holder.[2] If the president of the bank give to the depositor his personal certificate, instead of that of the bank, parol proof is admissible to show the true state of facts and to bind the bank.[3]

§ 1700. A bank is chargeable with knowledge of its depositor's signature, and if it issue a certificate of deposit payable to his order, and his name be forged as indorser, and the bank pays the amount to a *bona fide* holder, it has been held that it cannot recover back such amount from him.[4] The fact that a certificate is signed by the bank president in his own name does not preclude the depositor from showing that the bank itself is bound.[5]

§ 1701. *A certificate of deposit of a bank, if passed for a debt, is presumably conditional payment only;* and if refused payment the creditor may resort to the original consideration.[6] But if the party receiving the certificate makes use of it for his own purposes, not punctually requiring payment, it might be different.

In a Maryland case it appeared that on the 16th of October, 1860, Hoffman of Baltimore, being indebted to Bower of Cincinnati, deposited in a banking house in Baltimore the amount due ($206 31), and took a certificate of deposit running: "Received on deposit from V. Hoffman, Esq., $206 31, payable to the order of G. Bower, Esq., indorsed herein. (Signed) Josiah Lee & Co." Bower received acknowledged receipt of the certificate on 18th of October, 1860, and then transferred it to other parties, who demanded payment on the 20th of November, 1860. Two days previous Josiah

[1] Bank of Orleans v. Merrill, 2 Hill, 295; Edwards on Bills, 348.

[2] Bank of Chillicothe v. Dodge, 8 Barb. 233.

[3] Coleman v. First Nat. Bk. 53 N. Y. 388. [4] Stout v. Bendish, 39 Mo. 277.

[5] Coleman v. First Nat. Bk. 53 N. Y. 388.

[6] Lindsey v. McClelland, 18 Wis. 481. In Johnson v. Barney, 1 Clarke (Iowa), 531, where A., being indebted to B., inclosed him C. D.'s certificate of deposit for $945, and said in his letter, "please collect and place amount to my credit," it was held that B. received it only as agent for collection, and therefore was not an indorsee, save in that limited sense.

Lee & Co. had failed in business, and it was sought to make Hoffman liable for the amount. But the Court said: "Though the money deposited by Hoffman was not deposited by the authority of Bower, or with his previous knowledge, yet upon his acknowledgment of receipt of the certificate, he sanctioned the deposit as a payment to himself, especially as he made use of the certificate for his own purposes, and thus made Josiah Lee & Co. his agents to hold the fund subject to his order. Bower thus assuming control of the fund, it must be regarded as a payment of the debt due to him by Hoffman."[1]

SECTION II.

THE TRANSFER AND NEGOTIABILITY OF CERTIFICATES OF DEPOSIT.

§ 1702. As to the transfer of certificates of deposit, it must be governed by the same rules which control other promissory notes, and which vary according to the instrument's form. If it be payable to bearer it may be transferred by delivery, but if payable to order it should be indorsed. And when payable to order, mere manual delivery without indorsement or proof of a valuable consideration would not be evidence of title.[2] The liability of an indorser is the same as upon the indorsement of any other promissory note.[3] And if the certificate be transferred when overdue, the transferee takes it subject to equitable defenses.[4] But the certificate of deposit is not regarded as overdue and dishonored until actually presented for payment, when, as is usual, it is not payable at a particular time; and if the bank pay any portion of the amount due upon it to the original depositor without indorsing the credit on the certificate, a *bona fide* holder for value, without notice, may recover the

[1] Bower v. Hoffman, 23 Md. 264.

[2] Vastine v. Wilding, 45 Mo. 89.

[3] Mills v. Barney, 22 Cal. 240; Coye v. Palmer, 16 Cal. 158; Ford v. Mitchell, 15 Spoon. 304; Cate v. Patterson, 25 Mich. 191; Hazelton v. Union Bank, 32 Wis. 35; Pardee v. Fish, 60 N. Y. 265.

[4] Coye v. Palmer, 16 Cal. 158; Tripp v. Curtenius, 36 Mich. 494.

whole sum from the bank. The certificate is regarded as a continuing security, and hence this doctrine arises. In New York it was applied to hold the bank liable to the holder where the certificate which bore interest was transferred seven years after it was issued.[1] An indorser of a certificate of deposit remains liable until an actual demand is made, and the holder is not chargeable with neglect for omitting to make such demand within any particular time, for the instrument is a continuing security between indorser and indorsee.[2]

§ 1703. *As to the negotiability of certificates of deposit.*— It has been questioned whether or not certificates of deposit are negotiable. But we conceive that there can now be no doubt that they are negotiable when expressed in negotiable words. And this view is sustained by authority of experienced juridical writers as well as by adjudicated cases.[3] But there are cases to the contrary.[4] The Supreme Court of the United States held a certificate of deposit in the following form to be negotiable: "I hereby certify that H. S. has deposited in this bank, payable twelve months from 1st of May, 1839, with five per cent. interest till due, $1,500 for the use of H. M., and payable only to his order upon the return of this certificate."[5] And the like decision was ren-

[1] National Bank of Fort Edward v. Washington Co. National Bank, 12 N. Y. S. C. (5 Hun), 605 (1875). *Contra*, Tripp v. Curtenius, 36 Mich. 497 (1877).

[2] Pardee v. Fish, 60 N. Y. 271 (1875), citing Merritt v. Todd, 23 N. Y. 28 (see *ante*, 609). In Pardee v. Fish, the certificate bore interest. The plaintiff retained it from June 8th, 1872, to December 24th, 1872.

[3] Miller v. Austen, 13 How. 218; Bank of Peru v. Farnsworth, 18 Ill. 563; Laughlin v. Marshall, 19 Id. 390; Carey v. McDougald, 7 Ga. 84; Kilgore v. Bulkley, 14 Conn. 362; Bank of Orleans v. Merrill, 2 Hill, 295; Johnson v. Barrey, 1 Iowa, 531; Drake v. Markle, 21 Ind. (Kerr), 433; Bean v. Briggs, 1 Clarke (Iowa), 488; Fells Point Sav. Inst. v. Weedon, 18 Md. 528; Welton v. Adams, 4 Cal. 37; Brummagin v. Tallant, 29 Cal. 503; Mills v. Barney 22 Cal. 240; Cate v. Patterson, 25 Mich. 191; 1 Parsons N. & B. 26; Morse on Banking, 54; Edwards on Bills, 348; Pardee v. Fish, 60 N. Y. 265; Tripp v. Curtenius, 36 Mich. 494.

[4] Patterson v. Poindexter, 6 Watts & S. 227; Charnley v. Dallas, 8 Watts & S. 353; see also Sibree v. Tripp, 15 M. & W. 23.

[5] Miller v. Austen, 13 How. 918.

dered in Connecticut where the certificate ran: "I do hereby certify that W. T. & B. have deposited in this bank the sum of $10,608 75, payable on the first day of December next, to their order and the return of this certificate."[1] In California it was considered that the statute law had settled the question in favor of the negotiability of certificates of deposit; but it was thought that they were negotiable at common law.[2]

§ 1704. A simple certificate of deposit containing no words of promise to pay the amount is nothing more than a receipt, and could not be the basis of an action against the bank, nor would it be a transferable security. Parol evidence would be admissible to explain it, in the same manner as in the case of any other receipt; the word "certify" adding no additional force to the instrument as purporting a contract.[3]

§ 1705. In those cases where the certificate is payable to "A. B., or order," or to bearer, we think there is no doubt of its negotiability, and the cases cited bear us out in this view. But in Pennsylvania, Chief Justice Gibson, rendering the opinion of the court, held that a certificate running as follows: "I hereby certify that C. S. T. has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, per annum, $3,691 93, for the use of R. P. & Co., and payable only to their order upon the return of this certificate," was not a negotiable note, but "a special agreement to pay the deposit to any one who should present the certificate and the depositor's order."[4] And in

[1] Kilgore v. Bulkley, 14 Conn. 363. In Pardee v. Fish, 60 N. Y. 268 (1875), where the amount was expressed to be payable "on the return of this certificate," Miller, J., said: "Although a demand was necessary upon the bank before an action could be brought against it on the instrument, thus distinguishing the case from that of a promissory note, where the maker may be sued without any demand, I do not think that this fact takes away the negotiable character of the instrument under the decisions cited, and it must therefore be considered as possessing all the features of a negotiable promissory note."

[2] Welton v. Adams, 4 Cal. 37.

[3] Hotchkiss v. Mosher, 48 N. Y. 482 (1872).

[4] Patterson v. Poindexter, 6 Watts & S. 227; confirmed in Charnley v. Dallas, 8 Watts & S. 353.

England, where the form was: "Memorandum: Mr. Sibree has this day deposited with me £500 on the sale of £10,000 3*l.* per cent. Spanish, to be returned on demand," the court said that it was not intended to be, nor was it, a promissory note, either at common law or under the statute of Anne, but the evidence of an agreement respecting the deposit.[1] This latter decision does not militate against the negotiability of certificates drawn in negotiable form. And the true rule seems to us to be that expressed by a learned annotator, who says that "an instrument merely acknowledging a deposit upon whatsoever special terms, cannot be a promissory note;" and considers only such certificates to be notes as contain evidence that "the matter continues to deposit, or is converted into a loan, or that a present debt is created, accompanied by an undertaking to pay."[2]

§ 1706. In order, however, to be negotiable, a certificate of deposit must possess the requisite features of certainty in respect to parties, and time and mode of payment; and the same causes which deprive bills and notes of negotiability, would affect it in like manner. Thus, if payable "in currency," it would not be negotiable according to the principles which prevail as to bills and notes;[3] though it has been held otherwise.[4] So if payable in "United States six per cent. interest bearing bonds," it is a mere contract to deliver such bonds, and not negotiable.[5] In some of the States the general principles of the law merchant which determine negotiability do not apply, and peculiar words are necessary to make notes negotiable. The words "value received" are essential to the negotiability of a note in Missouri, and a certificate of deposit without such words has been held there to be not negotiable.[6] Whether or not in those States where it

[1] Sibree v. Tripp, 15 Mees. & Wels. 23.

[2] 1 Amer. Lead. Cas. 307.

[3] Huse v. Hamblin, 29 Iowa, 501; Rindskoff v. Barrett, 11 Iowa, 172; Lindsay v. McClelland, 18 Wisc. 481; Ford v. Mitchell, 15 Wisc. 304; London S. C. v. Hagerstown S. Bank, 12 Casey, 498.

[4] Drake v. Markle, 21 Ind. (Kerr), 433; see Vol. 1, §§ 55 *et seq.*; Pardee v. Fish, 60 N. Y. 265.

[5] Easton v. Hyde, 13 Minn. 90.

[6] International Bank v. German Bank, 3 Mo. App. 367.

is essential to the negotiability of a note, that it be payable at a bank (as is the case in Virginia and Indiana), a certificate of deposit in the usual form would be held negotiable is a question as yet undecided in any case within our knowledge.

§ 1707. Where the certificate states that the amount is payable "on the return of this certificate," or on "the presentment of this certificate," or uses some similar phrase—such language does not alter the legal effect of the instrument. And the holder is not regarded as being under any obligation to present it for payment before suit upon it; it is the bank's duty, like the maker of any other note, to find out the payee and pay it.[1] But when a certificate was given to A," payable to order of himself on presentation of this certificate, properly indorsed," it was considered so far like an ordinary deposit that A. could not sue the bank upon it without a previous demand.[2] And it has been held in Maryland that where a certificate is expressed to be payable "on return of the same," the statute of limitations only runs from the time of actual demand and notice.[3] It is considered, however, in some cases, that if the certificate be payable on demand (which is substantially the same as "on return of this certificate"), the statute of limitations begins to run from its date, and no special demand is necessary to put the statute in motion.[4]

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[1] Cate v. Patterson, 25 Mich. 191; Hunt v. Divine, 37 Ill. 137; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; affirming Smilie v. Stevens, 39 Vt. 315.

[2] Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377.

[3] Fells Point Savings Inst. v. Weedon, 28 Md. 320.

[4] Brummagin v. Tallant, 29 Cal. 503; Tripp v. Curtenieus, 36 Mich. 499.

CHAPTER LII.

CERTIFICATES OF STOCK, AND OTHER QUASI NEGOTIABLE INSTRUMENTS.

§ 1708. *The certificates of stock* issued to shareholders by incorporated companies are not regarded as strictly negotiable, although they inure to the benefit of the bearer, and may be classed amongst instruments *quasi* negotiable.[1] In a case before the United States Supreme Court, it was said: "Written contracts are not necessarily negotiable simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owners."[2]

§ 1709. In a later case before the same tribunal, it was held, however, that where a bank whose certificates of stock declared the stockholders entitled to so many shares of stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise, and which suffers a stockholder to transfer to anybody on the books of the bank his stock, without producing and surrendering the certificates thereof, is liable to a *bona fide* transferee for value of the same stock, who produces the certificates with properly executed power of attorney to transfer; and this is so, although no notice has been given to the bank of the transfer. The equities in this case were not allowed to be set up by the bank, because by its

[1] Mechanics' Bank v. Railroad Co. 13 N. Y. (3 Kern.) 599; Railroad Co. v. Howard, 7 Wall. 415.

[2] Railroad Co. v. Howard, 7 Wall. 415.

own act it had given implied assurance that there were none.[1] And it may be taken as settled by adjudication, as well as commercial usage, that a certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder. Where the party in whose hands the certificate is found is a holder for value without notice of any intervening equity, his title cannot be impeached.[2]

§ 1710. *As to dividend warrants.*—In England, it has been held, that a dividend warrant in the form of a check drawn by the Bank of England upon its cashier, payable to the plaintiff, but containing no words of negotiability, was not at law assignable; and that whatever might be the effect of an immemorial custom in a particular place, that the custom and usage of bankers and merchants, approved for sixty years, could not alter the law by which such an instrument conferred no right of action on an assignee.[3]

§ 1711. *Checks for baggage* issued by common carriers are not of the character of bills of lading and the like *quasi* negotiable instruments; and the persons receiving them are not presumed to know that they contain the terms upon which the property is carried.[4]

§ 1712. In regard to delivery orders, by which are meant orders given by a vendor on a bailee, who holds possession as his agent, it has been held in England, that delivery of the goods is not complete until the bailee has attorned to the buyer, and thus become his agent.[5] It has also been decided that such an order differs in effect from a bill of lading; that the indorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor, and

[1] Bank v. Lanier, 11 Wall. 369. See on this subject, Schouler on Personal Property, 631, 632, 633, 634.

[2] Prall v. Tilt, 28 N. J. (Eq.) 483.

[3] Partridge v. Bank of England, 9 Q. B. 396.

[4] Blossom v. Dodd, 43 N. Y. 264; see Buller v. Heane, 2 Cam. 415.

[5] Benjamin on Sales, 613.

that his lien remained unaffected, when neither the first buyer, nor the sub-vendee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded.[1] Where the defendants sold to B. & Co. 100 tons of zinc, and gave them four documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, twenty-five tons merchantable zinc off your contract of this date;" and upon the faith of these documents the plaintiffs bought of B. & Co., and paid for fifty tons of the zinc, and B. & Co. failed, without having paid for it themselves, whereupon the defendants refused to deliver it to the vendees—it was held that the delivery orders or undertakings did not estop them from setting up as against the vendees of B. & Co. their right as unpaid vendors to withhold delivery.[2]

§ 1713. *Dock warrants and warehouse keepers' receipts for goods*, independent of statute law, are of modern invention, and do not rest like bills of lading upon ancient mercantile custom, imparting to them a *quasi* negotiability. "These documents," says Blackburn, J., "are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order, or dock warrant, should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is therefore a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual

[1] McEwan v. Smith, 2 House of Lords Cases, 309; Griffiths v. Perry, 1 E. & E. 680; 28 L. J. Q. B. 208.

[2] Farmelœ v. Bain, 1 Common Pleas Div. 445 (1876).

delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."[1]

§ 1714. There are statutory enactments in England which greatly enlarge the effects of such instruments.[2] In Virginia, by recent act of Assembly, warehouse receipts for produce are made negotiable under certain rules and regulations.[3]

[1] Blackburn on Sales, 297; Benjamin on Sales, 613; Farina v. Home, 16 M. & W. 119. Earlier cases took a different view; see Lucas v. Dorrien, 7 Taunt. 268; Zwinger v. Samuda, 7 Taunt. 265; Keyser v. Suze, Gow, 58; see also Benjamin on Sales, 616.

[2] See Benjamin on Sales, 607, and the factors' acts there cited.

[3] See Acts of Assembly of 1874, p. 233.

CHAPTER LIII.

BILLS OF CREDIT.

§ 1715. The tenth section of the first article of the Constitution of the United States contains certain prohibitions and restrictions upon the power of the States; and the first clause of the section reads as follows: "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; EMIT BILLS OF CREDIT; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Herein, we are only concerned in the prohibition against the emission of bills of credit; but that prohibition it is important to consider, as negotiable instruments to which the States are parties are frequently impugned as coming within its pale; and sometimes a question of nicety is involved in determining whether they do or not. Every word of the prohibition, "No State shall emit bills of credit," is pregnant with significance. In the *first* place, the prohibition is upon the States only; and corporations chartered by the States may be authorized to issue bills which the State itself cannot issue.[1] In the *second* place, the word emit is appropriately selected, because it is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use.[2] And in the *third* place, the term "bills of credit," is used in a sense well understood when its history is adverted to. We propose to consider (1) What are bills of credit, and (2) What are not bills of credit.

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[1] Briscoe v. Bank of Kentucky, 11 Pet. 433 (1837).

[2] Craig v. State of Missouri, 4 Pet. 328 (1830).

SECTION I.

WHAT ARE BILLS OF CREDIT.

§ 1716. A bill of credit is a negotiable paper designed to pass as currency and circulate as money. Such a bill of credit as comes within the constitutional prohibition is a negotiable paper issued by the sovereign power of one of the United States, and designed to pass as currency and circulate as money.

§ 1717. The nature of this class of negotiable instruments, and the object and spirit of the constitutional restriction, first received a judicial exposition in the case of Craig v. State of Missouri.[1] In that case it appeared that the State of Missouri, with a view to relieve the necessities of the times, established loan offices to loan certain sums to citizens, taking security by mortgage redeemable in installments. The loan was in certificates in the following form:

"This certificate shall be receivable at the Treasury, or any of the loan offices of the State of Missouri, in the discharge of taxes or debts due the State for the sum of $, with interest for the same at the rate of two per centum per annum from this date, the day of , 182 ."

They were signed by the auditor and treasurer, were not to exceed in amount two hundred thousand dollars, and were to be of denominations not over ten dollars nor less than fifty cents.

They were also made receivable in payment of salt at the salt springs, and by all public officers, civil and military, in discharge of their salaries and fees of office. The proceeds of the salt springs, the interest accruing to the State, and all estates purchased, and all debts due the State, were constituted a fund for their redemption. Chief Justice Marshall, rendering the opinion of the majority of the court, said: "In its enlarged, and perhaps its literal sense, the term 'bill of

[1] 4 Pet. 411 (1830).

credit' may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes in common language denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood." And considering that the instruments in question, though calling themselves "certificates," were of the character above indicated, they were adjudged bills of credit, and void.

§ 1718. *That instruments bear interest does not render them the less bills of credit.*—In the same case,[1] Mr. Justice Johnson, dissenting, considered that a sufficient reason why the papers should not be regarded as bills of credit, was found in the fact that they bore interest, and consequently varied in value every moment of their existence. This, he said, "disqualifies them for the uses and purposes of a circulating medium, which the universal consent of mankind declares should be of a uniform and unchanging value, otherwise it must be the subject of exchange, and not the medium." The opinion of the court does not notice this argument; but it strikes us as without force—indeed as self-destructive. The very object of the constitutional provision was to inhibit the issue of a paper currency which would vary in value every moment of its existence, and was not of a uniform and unchanging value. Hence, these very qualities made them all the more bills of credit.

[1] Craig v. State of Missouri, 4 Pet. 438, 444, Thompson and McLean, JJ., dissenting.

§ 1719. *It is not necessary that a bill of credit should be a legal tender.*—It was contended further, in the same case, that these certificates, although deemed bills of credit in the common acceptation of the term, were not so in the sense of the Constitution, because they were not made a legal tender. But the prohibition is general. It extends to all bills of credit, not to bills of a particular description; and there is no just foundation for this distinction.[1]

§ 1720. It has been urged, upon the basis of more recent historical light on the subject, that no instrument is a bill of credit, within the meaning of the Federal Constitution, unless it be made a legal tender in payment of debts, and this was the opinion of as great a statesman as James Madison. It does not seem that this information was afforded in the cases decided by the Supreme Court of the United States, which take an adverse view; and it has been thought by that able publicist R. M. T. Hunter, of Virginia, that had it been supplied a different result might have been anticipated. Militating strongly against his opinion on the question is the fact that the very succeeding phrase of the Constitution contains an express prohibition against the States making anything but "gold and silver coin" a legal tender, which would alone be sufficient to interdict bills of credit, if Mr. Madison's and Mr. Hunter's conceptions are correct. This subject is of such extended interest that we append extracts from a recent report of Mr. Hunter, as treasurer of Virginia, submitting a financial scheme with arguments in support of it.[2]

[1] Craig v. State of Missouri, 4 Pet. 434.

[2] In one of the documents accompanying the annual message of the Governor of Virginia, made December 2d, 1874, is published Mr. Hunter's "Plan of a Constitutional Currency," communicated to Governor Jas. L. Kemper. It is briefly this:

"Let the State issue $3,000,000 in bills of the denomination of $1, $5, $10, $20, and in fractions of a dollar, with a provision that the holder may at pleasure convert these notes into bonds, in sums of $100, or multiples of $100, to draw interest from the State at the rate of four per cent. per annum, in specie. In addition to which the holder of this bond shall be allowed to re-invest into bills of

§ 1721. *The name is immaterial.*—The Chief Justice, in answer to the argument that the instruments in Craig v.

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the like denomination as at first; which bills shall bear no interest, but shall be convertible and reconvertible as originally provided. The interest on these bonds shall be paid semi-annually, unless the holder should convert them into currency at a shorter period, when interest shall be paid for the period of its existence as a bond. Until the sum of $3,000,000 has been issued, any holder of Virginia State bonds shall be allowed to exchange them for these bills at the market price in Richmond when sold for legal tenders. And when once issued these bills may be received at par in payment for half the taxes of any person or corporation who may owe the State for taxes." In the course of his argument Mr. Hunter says: "The privilege of paying half the taxes in these bills would add greatly to their credit, and, consequently afford great relief to our people. Nor would the State run any risk if it should not exceed the limit of $3,000,000—for every bill thus issued a corresponding value, and possibly a much larger amount in State stock, would be secured. In following the provisions of the law, no bill would be issued except in exchange for State stock at the market rate.

"It may be supposed that such an issue would subject the State to the tax of the United States upon the amount, but a reference to the law will show that the tax is imposed only upon the notes of any person, State bank, or State banking association, used for circulation. A description and enumeration of issues which does not include such an emission of bills by the State as is herein described. If it did, the United States would doubtless relieve the State from any tax upon such an issue designed to build up a sinking fund for a State so deeply indebted as Virginia, and one in which such an issue would perform so useful a function for currency purposes amongst a people so deeply depressed as ours.

"It has been objected that the provision herein proposed falls within the constitutional prohibition to the States to emit bills of credit. But a careful examination of the question, it is believed, will remove this objection. It has been a matter of much difficulty to decide what is a "bill of credit," within the meaning of the Constitution. Judge Marshall, in the case of Craig v. The State of Missouri, 4 Pet. 431, 432, which was decided by four out of seven judges, said, that to 'emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood.' Judge McLean, in Briscoe v. Bank of Kentucky, 11 Pet. 314, says, 'the definition which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.' Mr. Madison, in a letter hereafter to be quoted, says the Constitution meant such bills as were issued with a provision that they should be received as a legal tender. In the opinion of Marshall and McLean, the bills were not only to circulate as money, but to contain a pledge of the faith of the State to redeem them at some future time with money. Both attributes were necessary to lead to the mischiefs enumerated by Mr. Madison in the 44th number, p. 207, of the 'Federalist,' and both must have existed to render the bills unconstitutional.

"The last was especially necessary. It was not until there was an overissue of

State of Missouri were certificates of debt, not bills, continued: "Had they been termed 'bills of credit' instead of 'certificates,' nothing would have been wanting to bring them within the prohibitory words of the Constitution. And can this make any real difference? Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act, are as entirely bills of credit as if they had been so denominated in the act itself."

§ 1722. It was contended also that these instruments were not bills of credit, because they were not promises to pay, but promises to receive. But they were made receivable for official salaries and fees, and were designed to be used as currency, and thus were bills of credit.

§ 1723. *Being bottomed on a fund does not render the instrument any less a bill of credit.*—In the same case, Mr. Justice Thompson, dissenting, thought that the natural and literal meaning of the term "bills of credit" imported

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these bills, and the State became unable to pay them in money, or in some mode satisfactory to the holder, that the mischiefs began. Then, indeed, when the bills became irredeemable, they became worthless as a medium of exchange and a nuisance to society. Could the State have redeemed them in some satisfactory mode, no harm would have ensued. The plan here proposed is liable to no such objection, and does not come within the mischief sought to be prevented. There is no promise to pay this bill; the holder is to be allowed to fund it in a convertible bond of the State, which may always be done."

Mr. Hunter appends Mr. Madison's letter, dated Montpelier, February 2d, 1831, and found on page 210 of Selections from Private Correspondence of James Madison, from 1813 to 1836, published by J. C. McGuire, exclusively for private circulation, wherein Mr. Madison says: "The evil which produced the prohibitory clause in the Constitution of the United States was the practice of the States in making bills of credit, and in some instances appraised property, a legal tender."

bills drawn on credit merely, and not bottomed upon any real or substantial fund for their redemption. But although secured by a fund, the bill is nevertheless issued upon, and received upon, the credit of the State—the belief and faith that the State will pay them. Should the fund fail or be diverted, the credit of the State would still be pledged to their redemption; and even if the fund were mainly the source of the creditor's reliance, he would still look to the State, and credit it, to make faithful appropriation.[1] The circumstance, however, that a fund was appropriated to their redemption has been adverted to, amongst others, in subsequent cases, as decisive of the question that such bills were not bills of credit.[2]

In Louisiana, papers of the character indicated in the subjoined opinion of the court were adjudged bills of credit.[3]

[1] Story on the Constitution, § 1368, vol. II.

[2] Darrington v. Alabama, 13 How. 16.

[3] City National Bank v. Mahan, 21 La. Ann. 753 (1869). Ludeling, C. J: "Section 1 of the Act of 1866 provides 'that it shall be the duty of the governor, and he is hereby empowered to issue, on behalf of the State, from time to time, for the purpose of paying the current expenses of the State, in accordance with appropriations therefor, according to law, a sum not exceeding two millions of dollars in certificates of indebtedness.'"

"That they were issued on the faith of the State is apparent on the face of the certificates:

"'New Orleans, Louisiana, May 23, 1866.

"'It is hereby certified that five dollars is due by the State of Louisiana to bearer, and the State Treasurer is hereby directed to pay the same twelve months after date.

"'(Signed) H. Peralta, Auditor.

"'Approved: Adam Giffen, Treasurer.'"

"*Indorsement.*—'This certificate is receivable in payment of all State dues and for sale of public lands, and is fundable, at the option of the holder, in State bonds bearing six per cent. interest per annum, payable semi-annually, in accordance with the provisions of an act of the legislature approved ninth February, 1866.'"

"That they were designed to circulate as money is manifested by the act of the legislature as well as by the certificates themselves.

"The act aforesaid declares the certificates are to be issued 'for the purpose of paying the current expenses of the State.' Section two declares 'that the governor shall determine the denomination and form of the certificates; that they shall be printed and engraved under his direction and control, &c., and that they shall be receivable for all State taxes or other public dues, as well as for the sale of public lands.' They were issued in sums of five, ten, and twenty dollars,

SECTION II.

WHAT ARE NOT BILLS OF CREDIT.

§ 1724. *The States only prohibited from emitting them—corporations and private parties may do so.*—We have already defined bills of credit, as they are understood within the meaning of the Constitution. The inhibition contained in that instrument is limited to the States; and although the bill may be designed to circulate as currency, if it be not emitted by a State, it is as free from impeachment, as in violation of the Constitution, as any other negotiable paper. A State may therefore grant acts of incorporation authorizing banks or other associations to issue that description of paper to answer the purposes of money, and it may be issued by private persons and partnerships. This was determined by the United States Supreme Court in a case involving an act of the legislature of Kentucky, which incorporated the "Bank of the Commonwealth of Kentucky," in behalf of the Commonwealth, the president and directors of which were chosen by the legislature.[1] The bank was authorized to issue negotiable notes to the amount of three millions of dollars, which were declared to be receivable at the treasury and by public officers in payment of taxes, debts and county levies, and in discharge of executions of *fieri facias*. They were in denominations of from one to one hundred dollars. It was contended that these notes were bills of credit emitted by the Commonwealth of Kentucky, and that the paper medium of the country was intended to be embraced in the constitutional inhibition. But the Court held otherwise, McLean, J., saying: "If this argument be

in the similitude of ordinary bank bills, and they were actually circulated as money.

"We are constrained, therefore, to declare that said certificates were bills of credit, and that the act number five of the General Assembly of the State of Louisiana, entitled 'An Act to authorize the issue of certificates of indebtedness and of bonds for the funding of the same,' is null and void, being a contravention of section ten of article one of the Constitution of the United States."

[1] Briscoe v. Bank of Kentucky, 11 Pet. 328, Story, J., dissenting.

correct, and the position that a State cannot do indirectly what it is prohibited from doing directly be a sound one, then it must follow, as a necessary consequence, that all banks incorporated by a State are unconstitutional. This doctrine is startling, as it strikes a fatal blow against the State banks, which have a capital of nearly four hundred millions of dollars, and which supply almost the entire circulating medium of the country. * * * The Federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States, or to the people. A State cannot emit bills of credit, or, in other words, it cannot issue that description of paper to answer the purposes of money which was denominated, before the adoption of the Constitution, bills of credit. But a State may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation in the Federal Constitution on its exercise by the States in respect to the incorporation of banks."

§ 1725. In subsequent cases this view has been re-affirmed; and it is decided that, although a State may supply the whole capital of the bank, may be its only stockholder, select the directory, and receive the profits, if any be realized, and may make the bills receivable for debts and taxes, the bills of the bank cannot be called bills of credit issued by the State, not being made payable by the State, but by the bank only.[1] And the doctrine has been carried to the extent of holding such instruments valid, even though the State may pledge its faith for their ultimate redemption. In a case of this kind the Supreme Court said "it is impossible to say that bills of this kind come within the definition of bills of credit;" and the reasons assigned were, that upon the face of the bills there was no promise to pay by the State, but an express promise by the bank; that the bank had an ample fund for their redemption; that the guaranty of eventual

[1] Woodruff v. Trapnall, 10 How. 203 (1850); see, also, Curran v. Arkansas, 15 How. 304 (1853).

payment of the notes by the bank was remote and contingent, and merely formal, if the bank were properly conducted; and that because the State received the profits, it could be no more said that it issued the notes than that a private stockholder issued the notes of his bank.[1]

§ 1726. Not every promissory note, however, issued by the State constitutes a bill of credit. Bonds of the States are frequently issued with coupons attached for installments of interest. They are not bills of credit, because not issued to circulate as money, but to pay actual indebtedness in a convenient form.[2] And the fact that they are made receivable for dues to the State does not make them bills of credit.[3]

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[1] Darrington v. Alabama, 13 How. 15–17 (1851); to same effect, see Owen v. Branch Bank, 3 Ala. 258.

[2] McCoy v. Washington Co. 3 Wall. Jr. 389. See next note, and *ante*, § 1491.

[3] Antoni v. Wright, 22 Grat. 833; Wise v. Rogers, 24 Grat. 169; Maury v. Rogers, Id.; see Chapter XVI, on Governments as Parties to Negotiable Instruments, § 449, vol. 1.

CHAPTER LIV.

BILLS OF LADING.

SECTION I.

DEFINITION AND NATURE OF BILLS OF LADING.

§ 1727. Bills of lading are generally classed among negotiable instruments, and are frequently spoken of as negotiable, like bills of exchange, by text writers and by jurists of high reputation and authority.[1] But while they are assignable, and possess certain capacities of negotiation, which assimilate them quite closely in some respects to negotiable instruments, they are not negotiable in the same sense as bills of exchange or negotiable promissory notes.[2] And it is more correct to speak of them as *quasi* negotiable instruments, since they are rather like than of them.[3] This close resemblance to instruments strictly negotiable, and the frequent use made of them in commercial transactions, in connection with bills of exchange, sufficiently identifies them with the subject of this treatise to render a consideration of their leading characteristics desirable.

§ 1728. *As to their definition and nature.*—A bill of lading may be defined to be a written acknowledgment by the master of a ship, or the representative of any common carrier, that he has received the goods therein described for the voyage or journey stated, to be carried upon the terms and deliv-

[1] Lickbarrow v. Mason, 2 T. R. 63; Berkling v. Watling, 7 Ad. & E. 22; Bell v. Moss, 5 Whart. 189.

[2] Gurney v. Behrend, 3 E. & B. 622; 23 L. J. Q. B. 265; Barnard v. Campbell, 55 N. Y. 462; 1 Smith's Lead. Cas. 899.

[3] Schouler's Personal Property, 410, 605; Davenport Natl. Bank v. Homeyer, 45 Mo. 145.

ered to the persons therein specified. It is at once a receipt for the goods which renders the carrier responsible as their custodian, and an express written contract for their transportation and delivery.[1] And to facilitate commercial transactions, it has grown to be regarded as the symbolical representative of the goods which it describes; and its transfer carries with it such rights as the party in possession of the goods could transmit by actual corporeal transfer of the goods themselves.

§ 1729. *The bill of lading is clearly a receipt for the goods*, accompanied with a promise to redeem them to the bailor, or according to his order.[2] And while the master of the ship, or the agent of the carrier, has no authority to sign bills of lading for a greater quantity or different quality of goods than is actually received, yet the bill is sufficient *prima facie* evidence of the truth of its contents, even as between immediate parties;[3] and it may become conclusive against the carrier where the consignee or other parties have acted upon the faith of such representation, and have made advances or given credit, relying upon its truth, upon principles of estoppel.[4] Though while in so far as the bill is a contract it cannot be explained or contradicted by parol proof,[5] yet in so far as it is a receipt it would seem to be regarded by some authorities as open to explanation or contradiction in any hands.[6] Very clear proof would be required

[1] See on the subject, Schouler's Personal Property, 408; Redfield on Carriers, § 247; 1 Smith's Lead. Cas. 879 *et seq.*; Benjamin on Sales, 656.

[2] Knox v. The Nivella, Crabbe, 534.

[3] Nelson v. Woodruff, 1 Black U. S. S. C. 160; Hastings v. Pepper, 11 Pick. 43; The J. W. Brown, 1 Biss. 76; O'Brien v. Gilchrist, 34 Me. 554; May v. Babcock, 4 Ohio, O. S. 346 (1829); Clark v. Barnwell, 12 How. 272; Rich v. Lambert, Id. 347; Great Western R. R. v. McDonald, 18 Ill. 172; The Lady Franklin, 8 Wall. 325; Redfield on Carriers, §§ 247, 259; Bates v. Todd, 1 M. & R. 106; Dickerson v. Seelye, 12 Barb. 102; Wayland v. Moseley, 5 Ala. 430; Wolfe v. Myers, 3 Sandf. 7; Greenleaf on Ev. § 305.

[4] Schooner Freeman v. Buckingham, 18 How. 182; Sears v. Wingate, 3 Allen, 102; Redfield on Carriers, §§ 247, 263, 265.

[5] Cincinnati, &c. R. R. Co. v. Pontius, 19 Ohio St. 221.

[6] The Lady Franklin, 8 Wall. 325.

to show that the goods receipted for were not in fact received;[1] but if it were so shown, even a *bona fide* holder could not hold the owners of the vessel bound as to the excess, because it is not within the scope of the master's authority to issue such a bill of lading.[2] The carrier is not concluded by the statement in the bill of the amount or quantity or quality of the goods. It is *prima facie* only, and may be explained or contradicted.[3]

§ 1730. *The idea that bills of lading were negotiable* arose from the use to which they were appropriated, in the transfer of goods purchased, before they were delivered to the purchaser, or before they were paid for; but it will be seen that their peculiar properties are attributable rather to a liberal application of the doctrine of equitable estoppel for the benefit of trade, than to any custom or statute which placed them upon the footing of negotiable instruments,[4] for both of these sources of negotiability are wanting. The consignor of goods shipped takes from the master of the ship a bill of lading, and sending it to the consignee who has ordered the goods, draws upon him by bill of exchange for the purchase money. Before the goods reach their destination the consignor, who in the case instanced is the vendor of the goods, learns that the vendee is insolvent; and to prevent the injustice which would be done, if, in consequence of the vendee's insolvency, and while the price is yet unpaid, they were to be seized upon in satisfaction of his liabilities, the law confers upon the vendor the right to stop the goods *in transitu*, and to retain them until the whole purchase money is paid.[5]

But suppose the consignee has received the bill of lading

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[1] Little Miami, &c. R. R. Co. v. Dodds, 1 Cin. (Ohio), 47.

[2] Sears v. Wingate, 3 Allen, 102. The remedy is against the master or consignor. Brown v. Powell Coal Co. 10 C. P. L. R. 562. But see Relyea v. N. H. Rolling Mill Co. 43 Conn. 579.

[3] Abbe v. Eaton, 51 N. Y. 410.

[4] 1 Smith's Leading Cases, 897.

[5] Gibson v. Carruthers, 8 M. & W. 336; Snee v. Prescott, 1 Atk. 246; D'Aquila v. Lambert, 2 Eden, 95; Amb. 39.

of the goods, deliverable to him or his assigns, or indorsed to him or his assigns, by the consignor, and has assigned the bill by indorsement to a *bona fide* third party, then the vendor's right to stop the goods *in transitu* and hold them as security for the purchase money is defeated, and the assignee of the bill acquires as perfect a title to the goods, although they have not reached the buyer's hands, as if they had actually passed through his hands and been delivered bodily to him. This was decided in the leading case of Lickbarrow v. Mason,[1] and may now be regarded as the settled law of England and of the United States. But this capacity of the bill of lading for transferring the right of property, under these circumstances, does not imply that it is a negotiable instrument to all intents and purposes.

[1] In 1 Smith's Leading Cases, 895, 896, it is said by the learned American annotators in the course of their masterly comments on Lickbarrow v. Mason: "It would seem evident from what has been said, that Lickbarrow v. Mason should not be considered as going beyond the only point which it actually determines, that the right of a vendor to stop *in transitu*, may be defeated by a sale made by the vendee, accompanied by a transfer of the bill of lading, and not treated as giving bills of lading the character of negotiable instruments, which was wholly unnecessary for the purposes of the decision. For, as the property passes under such circumstances by the sale, the indorsement of the bill has no other effect than that of defeating the right of the vendor to reclaim it, by operating as a constructive and symbolic delivery. The utmost, therefore, that this decision establishes, is an exception to the rule, that an unpaid vendor has a right to stop *in transitu*, an exception and a rule, which have nothing in common with the negotiability, either of the bill of lading, or of the property which it represents. Nothing can in fact be a greater departure from the principles and analogies of the common law, than to treat bills of lading, or other documentary evidences of title to chattels personal, as negotiable instruments. Instruments which represent choses in action may be negotiable, because the right cannot be separated from the instrument, and has no distinct or actual physical existence. And even there, negotiability only exists in the case of absolute promises for the payment of money, a thing negotiable in itself, and which cannot be reclaimed by the true owner from any one who has received it *bona fide* and in exchange for a valuable consideration. But chattels personal are wholly insusceptible of negotiation in themselves, and it is manifestly inconsistent to give the documents which represent them, a different character. * * * The result of the cases, therefore, as a whole, seems to be that while, on the one hand, the possession of bills of lading, or other documents of the same nature, may be evidence of title, and equivalent for some purposes to actual possession, yet, that on the other, it does not constitute title, nor dispense with the rule *nemo plus juris ad alium transferre potest, quam ipse habet*."

If the goods had actually reached the consignee, and he were to sell them to a third party, although they might be unpaid for, such third party would acquire a perfect title against the world.[1] But a sale of goods not yet received by the vendee, without a transfer of the bill of lading, would not divest the right of stoppage *in transitu*.[2] And after goods have reached the consignee, the right of stoppage *in transitu*, as its very terms import, is at an end.[3] To stop them while *in transitu* is an equitable remedy, first applied by courts of equity in order to prevent injustice to the vendor; but, on the other hand, it is considered that if the vendor has chosen to transmit to his vendee the documentary evidence of title to the goods, accompanied with authority (which a bill of lading imports) to vest the same in his assignee, and he has done so before the goods have reached their destination, then the equitable right to stop them must yield to the broader and more commanding equity of the *bona fide* purchaser of the bill of lading to hold them as his own.[4]

§ 1731. Thus the bill of lading passes the property, when it is indorsed and intended so to operate, in the same manner as a direct delivery of the goods would do if so intended, and it operates no further.[5] It constitutes a symbolic and constructive delivery of the goods,[6] being the proper substitute for the actual delivery of goods at the time at sea *en route* to the consignee, and the arrival and delivery of which the consignor has placed it in his power by the bill

[1] Ilsey v. Stubbs, 9 Mass. 65; Winslow v. Norton, 29 Me. 419; Nathan v. Giles, 5 Taunt. 588.

[2] Craven v. Ryder, 6 Taunt. 433; Holmes v. Crane, 2 Pick. 606.

[3] Edwards v. Brewer, 2 M. & W. 375; Nicholls v. Lefevre, 2 Bing. N. C. 83.

[4] 1 Smith's Leading Cases, 891.

[5] Newsom v. Thornton, 6 East, 41; Gardner v. Howland, 2 Pick. 599; Mears v. Waples, 3 Houst. (Del.) 582; Empire Trans. Co. v. Steele, 70 Penn. St. 190; Mower v. Peabody, 3 Kern. 121; Indiana, &c. Bank v. Colgate, 4 Daly, 41; Emery v. Irving Nat. Bank, 25 Ohio St. 360.

[6] Mechanics', &c. Bank v. Farmers', &c. Bank, 60 N. Y. 47, Miller, J.: "The delivery of the bill of lading to the plaintiff was a good symbolical delivery of the grain, and the plaintiff thereby acquired a lien upon it, or title to it, and was fully authorized to hold it until the loan was paid."

of lading to anticipate.[1] And being the substitute and symbolic representative of goods not then delivered, it becomes *functus officio* as soon as they are landed and warehoused in the name of the holder, who then becomes possessed of the goods themselves in the eye of the law, and derives his power not from the bill of lading, but from such possession.[2] But it has been held in England, that until replaced by the wharfinger's warrant, bills of lading continue to represent the goods at a sufferance wharf.[3] The indorsement and delivery of a bill of lading to a bank as collateral security for paper discounted, operates the same as the delivery of the goods; and the bank can hold them so far as necessary to pay the discounted paper as against the consignee or any other person.[4]

§ 1732. *As to who may issue a bill of lading*—This may be done by any common carrier, as well those which carry by land as by water, though the term "bill of lading" seems to have had its origin from the act of "lading" vessels, which in the early days of commerce were the most frequent vehicles of trade. Railroad corporations,[5] express companies,[6] and all other common carriers may issue such a bill.

The bill of lading must be issued by the carrier or its representative. If the paper be signed by the consignor only, it is not a bill of lading.[7]

The obligation of the carrier to give on receiving goods a bill of lading, extends only to acknowledging the receipt of the goods, and expressing the promise to carry and deliver them. He is not bound to specify the freight.[8]

[1] Pratt v. Parkman, 24 Pick. 42. [2] Hatfield v. Phillips, 9 M. & W. 467.

[3] Meyerstein v. Barber, L. R. 2 C. P. 661; 36 L. J. C. P. 361, Martin, B., saying: "For many years past, there have been two symbols of property of goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods."

[4] First Nat. Bank v. Kelly, 57 N. Y. 34.

[5] Stevens v. Boston, &c. R. R. Co. 8 Gray, 262; Illinois Central Railroad Co. v. Owens, 53 Ill. 391; Lawrence v. N. Y. &c. R. R. Co. 36 Conn. 63; Steinweg v. Erie R. R. Co. 43 N. Y. 123; Worden v. Bemis, 32 Conn. 268.

[6] Grace v. Adams, 100 Mass. 505. [7] Gage v. Jaqueth, 1 Lans. 207.

[8] The May Flower, 3 Ware, 300.

§ 1733. Although the bill of lading is signed by the master of the ship, his subscription is as agent for the owners, and the contract is binding upon them.[1] But the master has no authority to grant a bill of lading unless the goods be actually received on board the ship; and if he transcend his authority in this respect, and the goods be not on board, the shipowners will not be bound by the bill, although it be transferred to a *bona fide* indorsee for value.[2] Evidence that the consignor took a bill of lading from one whom he believed to be, and who acted as, master of the ship, indorsed and sent it to the consignee, and insured the goods payable to the latter, warrants a finding of delivery to the consignee, although the party acting as master had no authority to sign it.[3] In New York, where defendant's agent, upon delivery to him of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs at New York, and to be transported and delivered to them, the said agent being informed at the time that M. intended to use them at bank. M. drew sight drafts on the bills of lading, and delivered them to a bank which forwarded them to New York, where the plaintiffs paid them on presentation upon the faith and credit of the bills of lading. In an action upon the bills of lading, it was held that defendant was bound by the acts of its agent, the same being within the apparent scope of his authority, that it was estopped to deny the receipt of the lard, and that plaintiffs were entitled to recover.[4]

§ 1734. A bill of lading for the goods sent in pursuance of orders of the consignee, and a bill of exchange for the purchase money, are sometimes sent by the consignor under one inclosure to the consignee. In such case the bill of exchange

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[1] Abbott on Shipping; Ferguson v. Coppeau, 6 Harr. & Johns. 394.

[2] Grant v. Norway, 2 Eng. L. & Eq. 337; 10 C. B. 665; Hubbersty v. Ward, 18 Eng. L. & Eq. 551; The Loan, 7 Blatch. 244; Sears v. Wingate, 3 Allen, 103.

[3] Prince v. Boston, &c. R. R. Co. 110 Mass. 542.

[4] Armour v. Michigan C. R. R. Co. 65 N. Y. 111 (overruling same, 3 J. & S. 563), disapproving and distinguishing Grant v. Norway, *supra*.

must be honored, or the bill of lading cannot be retained; and if it is detained, the consignee has no right to the goods.[1] Frequently the consignor takes a bill of lading from the carrier, draws upon the vendee for the price, and delivers the bill of exchange with the bill of lading attached to an indorsee for value. In such cases the consignee takes the goods subject to the right of the holder to demand payment of the bill of exchange, and cannot return the price of the goods on account of a debt due to him by the consignor.[2] In other cases the consignor sends the bill of lading to the consignee, and awaits a future settlement of the purchase money.

And in the others still, he retains the bill of lading, and sends it to his agent, with instructions not to deliver it to the consignee until the purchase money is paid, thus avoiding the risk of losing the goods by a transfer of the bill of lading by the consignee, and his refusal to pay for them.[3] In New York, where the consignee of goods accepted a draft in favor of a third person for the amount, sold the goods, but neglected to pay the draft, the drawer was held entitled to follow the proceeds of the goods, and to recover them from the consignee.[4] Where a bill of lading is forwarded pinned to a draft, it is not demonstrative of an intention to make it security for the draft, but usage might show such to be the case.[5]

SECTION II.

THE ELEMENTS OF A BILL OF LADING.

§ 1735. *As to the form and contents of bills of lading.*— Bills of lading are usually signed in sets of three, one of

[1] Sheppard v. Harrison, L. R. 5 H. L. 116; Marine Bank v. Wright, 48 N. Y. 1; Indiana, &c. Bank v. Colgate, 4 Daly, 41.

[2] Emery v. Irving National Bank, 25 Ohio St. 360.

[3] Brandt v. Bowlby, 2 B. & Ad. 932.

[4] Kelly v. Scripture, 16 N. Y. S. C. (9 Hun), 284. As to the New York Factors Act (§ 3, chap. 179, Laws of 1830), see First National Bank v. Shaw, 61 N. Y. 383; M. & T. Bank v. F. & M. Bank, 60 N. Y. 41.

[5] Mears v. Waples, 4 Houston, 62.

which is retained by the freighter or consignor, one sent to the consignee, and one kept by the master for his own use. But sometimes they are granted in sets of four,[1] or there may be only a single bill.[2] The bill retained by the carrier ("the ship's bill," as it is called when goods are shipped on a vessel), is designed only for its own information and convenience, not for evidence as between the parties of what their agreement was. And if it differs from the others, they must be considered as the true and only evidence of the contract.[3]

§ 1736. It is usual for the name of the consignee of the goods to whom, or to his assign, they are to be delivered, to be mentioned. But the bill is sometimes made out for delivery to the consignor or his assigns; and sometimes "to ——— order, or ——— assigns," which form imports an engagement to deliver to the person whom the consignor shall nominate, and his assigns.[4] Or it may be made out to bearer.[5] If negotiable words be contained in the bill of lading, they only indicate the intention of the shipper as to the person for whose use the consignment is made; and the bill is transferred by delivery whether negotiable words be inserted or not.[6] The consignee's title is complete if the bill contain his name, and is sent to him; and the goods are his, subject only to the consignor's right to stop them *in transitu* for breach of the conditions of sale. If the consignor be himself consignee also, and sends the bill of lading to a third party, indorsed to him in full or in blank, the effect is the same as if such party were named in the bill as consignee.[7]

§ 1737. Where there are several bills of lading, each is a contract in itself as to the holder, but there is but one contract as to the masters and owners. Therefore if the several

[1] Lickbarrow v. Mason, 2 T. R. 63.
[2] Dows v. Perrin, 16 N. Y. 325.
[3] The Thames, 14 Wall. 98.
[4] Smith's Mercantile Law, 377.
[5] Allen v. Williams, 12 Pick. 297.
[6] Emery v. Irving National Bank, 25 Ohio St. 360.
[7] Walley v. Montgomery, 3 East, 585.

numbers of the set of bills of lading be indorsed to different persons, and there be competition for the goods, the rule is, that if the equities be equal, the property passes by the bill first indorsed.[1] For the principle is settled, that if the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires possession has priority.[2] And if a party makes advances on faith of a shipment, one who afterward with notice of the fact, though before the first bill of lading is delivered, receives a second bill of lading for the goods, is not entitled to its benefit.[3]

§ 1738. *Contents.*—The bill of lading contains the quantity and marks of the merchandise; the names of the shipper, of the consignee, and of the master of the ship; the places of departure and discharge; and the price of the freight. Sometimes it states also the condition of the goods. And from early times it has been the custom to express as a limitation of the contract to carry and deliver the goods, "the dangers of the sea excepted." In later times, the exception has been usually extended to the acts of God, public enemies, fire, and all other dangers and accidents of the seas, rivers and navigation.[4] Other clauses are sometimes inserted in the bill of lading, according to the nature of the contract between the parties to it, to provide, for instance, for the payment of demurrage (by which is meant the allowance or payment for detention of the ship) by the consignee, the effect of which is to bind the consignee to pay it if he receive the goods—for the acceptance of goods by the consignee, in pursuance of a bill of lading whereby the shipper makes payment of freight or demurrage a condition precedent to delivery, is evidence of an undertaking by the consignee to pay such demand.[5] Where the bill contains the words, "demurrage $10 a day after four days," its meaning is, that the ves-

[1] Caldwell v. Ball, 1 Term. R. 205; Meyerstein v. Barber, L. R. 2 C. P. 661; 36 L. J. C. P. 361; 3 Kent Com. 284.

[2] Lanfair v. Sumner; Lamb v. Durant, 12 Mass. 54; 1 Smith Lead. Cas. 891.

[3] Stevens v. Boston, &c. R. R. Co. 8 Gray, 262.

[4] 3 Kent Com. 282, Lect. XLVII. [5] Scaife v. Tobin, 3 B. & Ad. 523.

sel is entitled to demurrage after four days from her arrival at the specified place, and her master notifies the consignee of arrival. This cannot be varied by proof of usage that such a clause means four days after the vessel obtains a berth, though such evidence may be proper where the master has liberty to choose a landing place.[1] Where the bill contains no provision for the payment of demurrage, the consignee, or his assignee is not liable therefor, even if he receives the cargo, much less where he assigns the bill before delivery of the cargo.[2]

§ 1739. A clause in a bill of lading providing that the goods immediately upon delivery by the carrier, shall be at the risk of the shipper, constitutes a valid special contract. But it must be reasonably construed, and no obligation otherwise resting on the carrier is thereby removed, except such as is expressed or reasonably implied. He must notify the consignee of the arrival of the goods, proffer a delivery at a reasonable and proper time, and afford the consignee's agents an opportunity to identify and receive them. These things done, his liability ceases, unless his agents negligently deliver them to an improper person.[3] And even where loss or damage from neglect of an agent is excepted, it would be construed as contemplating only the hazards of transportation, and not negligence in delivering the goods to a person without authority to receive them.[4]

§ 1740. If a particular vessel be named in the bill of lading by the carrier, it must be assumed that the owner of the goods designated her as the proper one to take the goods, having regard to the voyage and time of sailing, and the carrier cannot send by another vessel without assuming the whole risk of loss or damage to the goods while on such vessel.[5]

Where a place of landing the goods is named in the bill

[1] Philadelphia, &c. R. R. Co. v. Northam, 2 Ben. 1.

[2] Gage v. Morse, 12 Allen, 410.

[3] The Santee, 7 Blatch. 186.

[4] Goddard v. Mallory, 52 Barb. 87.

[5] Guillaume v. Hamburgh, &c. Packet Co. 42 N. Y. 212.

of lading, they must be there landed if it can be done with safety.[1]

Where a railroad corporation issues a bill of lading containing an exception of liability for damage or loss by fire or explosion, such special clause cannot exempt it from liability for loss by fire occasioned by sparks from its own locomotive, from which the goods were not diligently protected by proper apparatus.[2]

By issuing a bill of lading of goods as deliverable to order, the carrier becomes bound not to deliver them without the production of such order; and laches of the holder in not presenting the order, however it may warrant the carrier in divesting itself of the special risks assumed as carrier, forms no warrant for a delivery of the goods to a person having no authority to receive them.[3]

§ 1741. When losses by the perils of the sea are excepted in the bill of lading, it is incumbent on the carrier to show that any loss which has occurred was occasioned by such peril;[4] but when the peril is shown to have existed, the carrier is *prima facie* relieved from liability, and its negligence, if averred, must be proved.[5] So where loss from "rust, leakage or shrinkage" is excepted in the bill, the shipper must prove negligence in order to charge the carrier with such loss.[6] And, indeed, wherever negligence enters into the cause of the loss, the carrier is liable, although it proceeded from an excepted source.[7] When the bill of lading contains a clause exempting the carrier from liability for loss "by theft on land or afloat," it is not intended to apply to a theft by the purser of the ship put in charge of the articles.[8]

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[1] Shaw v. Gardner, 12 Gray, 488.

[2] Steinweg v. Erie R. R. Co. 43 N. Y. 123.

[3] The Thames, 7 Blatchf. 226.

[4] Hooper v. Rathbone, Taney, 519; The Juniata Paton, 1 Biss. 279.

[5] Transportation Co. v. Downer, 11 Wall. 129; The Juniata Paton, 1 Biss. 15.

[6] The Invincible, 1 Low. 225.

[7] Gill v. General Iron Screw Collier Co. L. R. 1 C. P. 600; The David and Caroline, 5 Blatchf. 266.

[8] Spinetto v. Atlas Steamship Co. 21 N. Y. S. C. (14 Hun), 100.

§ 1742. *As to the condition of the goods.*—A recital in a bill of lading, that a cask was received "in good order and well conditioned," extends only to the apparent external condition of the cask, excluding any implication as to its intrinsic soundness and sufficiency.[1] And the recital "received in good order and condition" is merely presumptive evidence that the goods were free from internal injuries.[2] The words "shipped in apparent good order" do not change the legal effect of the bill, and it is only *prima facie* evidence that they were in good order; the admission being limited to the apparent condition, a latent defect may be shown by the carrier.[3]

Where the master of the vessel uses all proper diligence, the charterers cannot recover damages for delay caused by forcible detention by the government.[4]

SECTION III.

TRANSFER OF BILLS OF LADING.

§ 1743. *As to who may transfer the bill of lading.*—Strictly speaking, no person but the consignee, when the bill of lading is made out in his name, can pass legal title to the goods, by indorsement of the bill, its *prima facie* effect being to vest ownership in him.[5] But if the consignor be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be consignee also, or it be deliverable to his order, yet by any assignment, either on the bill of lading or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. Such an assignment not only passes the legal title as against

[1] The Olbers 3 Ben. 148.
[2] Richards v. Doe, 100 Mass. 524.
[3] The Oriflamme, 1 Saw. 176.
[4] The Onrust, 1 Ben. 431.
[5] The Sally Magee, 3 Wall. 457.

his agents and factors, but also against his creditors, in favor of the assignee.[1] It is necessary that the bill of lading be delivered, in order to pass the goods, and an indorsement without delivery will not suffice.[2] But putting it in the post-office, addressed to the indorsee or to another for him, would be a valid delivery.[3] When the indorsement of a bill of lading is proved, it will be presumed to have been indorsed for value, until the contrary is shown.[4]

§ 1744. A bill of lading indorsed in blank was supposed at one time to be distinguishable from one indorsed to a particular person;[5] but it has long since been conceded and established that no such distinction can be supported, and an indorsement in blank filled up to a particular person is as effectual as if originally so written.[6]

§ 1745. A bill of lading may be indorsed with conditions or restrictions to the same effect as the like indorsement of a bill of exchange or promissory note. Thus, if the goods are to be delivered provided A. B. pay a certain draft, all subsequent indorsees take subject to that condition, and have no title until it is complied with.[7] And the indorsement of a bill of lading "without recourse" was recently held to be valid; and the shipowners having delivered the goods in pursuance of it, were not permitted to sue for the original consideration.[8]

§ 1746. Between the original vendor and vendee, the transmission or indorsement of the bill of lading is as ineffectual for all purposes as for the absolute transfer of the property, and only serves as evidence of their relations without itself affecting them. Its receipt by the consignee and vendee does not defeat the vendor's right of stoppage *in transitu*. And the only case in which the transfer of the

[1] Conard v. Atlantic Insurance Co. 1 Pet. 445.
[2] Allen v. Williams, 12 Pick. 297. [3] Buffington v. Curtis, 15 Mass. 528.
[4] Dracachi v. Anglo-Egyptian Navigation Co. L. R. 3 C. P. 190.
[5] Snee v. Prescott, 1 Atk. 245. [6] Lickbarrow v. Mason, 2 T. R. 63.
[7] Barrow v. Coles, 3 Camp. 92; Walley v. Montgomery, 3 East, 585.
[8] Lewis v. M'Kee, L. R. 2 Ex. 37.

bill of lading confers greater rights than could be conferred without such transfer, is as between the consignor and consignee on the one hand, and a transferee of the bill, as the representative of the goods to a *bona fide* purchaser on the other.[1]

§ 1747. The common law respecting bills of lading has been very much changed by statute in England, and in some of the United States; and other documentary evidences of title are placed in some cases on the same footing. But it would be trespassing too much upon the necessary and legitimate topics of this volume to discuss the modifications of statute law, and the nature of other instruments assimilated in a greater or less degree to those strictly negotiable.[2]

§ 1748. *Difference between consignee and vendee.*—By the common law, a factor or consignee stood in a different situation from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading; for the reason, that though he might bind his principal by a sale thereof, he could not do so by a pledge, that not being within the usual scope of his authority.[3] And even when the indorsement was by the vendor himself, the transfer operated only as a conveyance of the property in the goods, but not as an assignment of the contract, so that the indorsee could not sue upon the bill of lading,[4] except in admiralty, where different rules obtained.[5] But now the effect of the factor's act in England is to give validity to pledges by agents, as well as to sales;[6] and whether the consignor be vendor, or merely consigning the goods for sale, his right of stoppage will be defeated by the assignment of the bill of lading, even to a person not a vendee, but from whom money has been

[1] Rowland v. Bigelow, 12 Pick. 307; Gurney v. Behrend, 3 El. & B. 622.

[2] See Cartwright v. Wilmerding, 24 N. Y. 521.

[3] Newsom v. Thornton, 6 East, 17; Martin v. Coles, 1 M. & S. 140; Burton v. Curyea, 40 Ill. 320; *contra*, Marine Bank v. Wright, 48 N. Y. 1.

[4] Thompson v. Downing, 14 M. & W. 403; Sanders v. Vanzeller, 4 Q. B. 297; Smith's Mer. Law, 380.

[5] The Rebecca, 5 Rob. Adm. 102; 1 Pars. Shipping, 193.

[6] Benjamin on Sales, 607, 608, 657; 1 Smith's Lead. Cas. 885.

borrowed on the faith of it. And by the bills of lading act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or indorsee, to whom the property in the goods shall pass.[1]

§ 1749. *As to the bona fide transferee.*—The transfer of the bill of lading, in order to affect the vendor's right of stoppage *in transitu*, must be, both by the common law and the statute law of England, to a *bona fide* third person. But it is not requisite to *bona fides* that such person should be without notice that the goods have not been paid for, because a man may be perfectly honest in purchasing goods which he knows have not been paid for, but without notice of such facts as render the bill of lading not fairly and honestly assignable.[2] If, however, the transferee of the bill of lading knew at the time of transfer that the consignee of the goods was insolvent, or in any way assisted to defraud the consignor, he can stand in no better situation than the consignee, and the consignor retains the right of stoppage *in transitu* against him.[3]

§ 1750. The bill of lading not being negotiable, the mere honest possession of such an instrument, indorsed in blank, or in which the goods are made deliverable to bearer, although acquired for a valuable consideration, is not such a title to the goods as the like possession of a bill of exchange or negotiable note would be to the money promised to be paid by the acceptor or maker. The indorsement of a bill of lading can, therefore, give no better right to the goods than the indorser himself had (unless by statutory enactment), for the bill of lading is unlike commercial paper in this: that the assignee cannot acquire a better title to the property symbolically delivered than his assignor had at the time of assignment.[4] If, therefore, the owner should lose or have stolen[5]

[1] Benjamin on Sales, 658.

[2] Cuming v. Brown, 9 East, 506.

[3] Vertue v. Jewell, 2 T. R. 681.

[4] Emery v. Irving National Bank, 25 Ohio St. 255. See Voss v. Robertson, 46 Ala. 483.

[5] Gurney v. Behrend, 3 E. & B. 622; 23 L. J. Q. B. 265; Brower v. Peabody,

(or have obtained from him by fraud as it seems),[1] a bill of lading indorsed in blank, the finder, or the thief could confer no title upon an innocent third person. But the title of *bona fide* third parties will prevail against the vendor who has actually transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so, because a transfer obtained by fraud is not void, but voidable only.[2]

§ 1751. The indorsee of a bill of lading may libel the vessel in which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee for another —as, for instance, the cashier of a bank.[3] And the consignee of the goods to whom the bill has been indorsed, may not only libel the carrier vessel for its default, but also a vessel by whose tortious collision with the carrier vessel the goods have been lost.[4]

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3 Kern. 126; Dows v. Perrin, 16 N. Y. 333; Barnard v. Campbell, 55 N. Y. 462; Benjamin on Sales, 658; 1 Smith's Lead. Cas. 900.

[1] Dows v. Perrin, 16 N. Y. 325. But see Cartwright v. Wilmerding, 24 N. Y. 521.

[2] Pease v. Gloahec, L. R. 1 Privy C. App. 219; Benjamin on Sales, 658.

[3] The Thames, 14 Wall. 98.

[4] The Vaughan, 14 Wall. 258.

CHAPTER LV.

GUARANTIES, AND THE LAW OF GUARANTY AS APPLICABLE TO NEGOTIABLE INSTRUMENTS.

SECTION I.

DEFINITION, NATURE AND CONSTRUCTION OF GUARANTIES.

§ 1752. A guaranty is defined to be a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is, in the first instance, liable to such payment or performance.[1] The word guaranty signifies the same as warranty, and both words are derived from the French verb *garantir*, to undertake, and were formerly used as synonymous terms.[2]

§ 1753. Guaranty is a peculiar kind of suretyship, as is also an indorsement; but guaranty differs from indorsement, and it differs also from the ordinary contract of a surety. The distinction between a guarantor and an ordinary surety is not easily defined, and the terms have been frequently used as convertible. A surety is generally a co-maker of the note, while the guarantor never is a maker; and the leading difference between the two is, that the surety's promise is to meet an obligation which becomes his own immediately on the principal's failure to meet it, while the guarantor's promise is always to pay the debt of another.[3] A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatever, or any notice of his default. He may

[1] Fell on Guaranty, 1; Story on Notes, § 457; Smith's Mercantile Law, chap. XI, sec. 1.

[2] Burrill's Law Dictionary.

[3] 2 Parsons N. & B. 118.

be damaged by reason of no demand being made or notice given, and he may be sued as a promisor.[1]

The guarantor's liability is less stringent, and unless demand is made within a reasonable time, and notice given in case of default, he is discharged to the extent that he may be damaged by delay. Thus, if the debtor has in the meantime become insolvent, so that he could not have recourse upon him, he could not be held.[2] Thus, we see the surety's liability is primary and direct, like that of the principal. The guarantor's is secondary and collateral. And, in general, the guarantor contracts to pay, if, by the exercise of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment at once, if the principal debtor makes default. As has been well said, the surety "is an insurer of the debt; the guarantor is the insurer of the solvency of the debtor.[3]

§ 1754. The liability of a guarantor also differs materially from, and is more onerous than that of an indorser. The indorser contracts to be liable only upon condition of due presentment of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made, and notice given to him of dishonor, within a reasonable time. And in the event of a failure to make presentment and give notice within such reasonable time, he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay.[4]

§ 1755. *As to construction of guaranties.*—For the interpretation of guaranties, the cases lay down very opposite rules. Some of them incline to construe the guaranty most

[1] Perry v. Barret, 18 Mo. 140. [2] Ibid.

[3] Krampt's Ex'x v. Hatx's Ex'rs, 52 Penn. R. 525; Reigart v. White, Ibid. 438; Arents v. Commonwealth, 18 Grat. 770.

[4] Arents v. Commonwealth, 18 Grat. 770; Story on Notes, § 460.

strongly against the guarantor, on the ground that the words of an instrument are to be taken most strongly against the party using them.[1] Others construe it strictly, because it is (generally) an engagement to answer for the debt of another.[2] Certainly, where there are ambiguous phrases used, they are to be taken most strongly against the guarantor, upon the general principle which throws the burden of ambiguity upon the party creating it.[3] But no special rules, different from those which apply to other contracts, govern it, and it ought to receive a fair and liberal interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of its terms. On the other hand, as guaranties are contracts of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement. Letters of guaranty are commercial instruments, generally drawn up by merchants, sometimes inartificial and often loose in their structure and form. They should not, therefore, be construed with nice and technical care; but according to the facts and circumstances accompanying the transaction, holding in view as the main object to ascertain and effectuate the intentions of the parties.[4]

§ 1756. If the guaranty propose a credit, that particular credit must be granted, or the guarantor will not be bound.[5] An authority to draw bills at ninety days from time to time

[1] Mason v. Pritchard, 12 East, 227; Mayer v. Isaac, 6 M. & W. 610; Drummond v. Prestman, 12 Wheat. 518.

[2] Whitney v. Groot, 24 Wend. 82; Bigelow v. Benton, 14 Barb. 128; Evans v. Whyle, 5 Bing. 485; 15 E. C. L. R. 514; Nicholson v. Paget, 1 C. & M. 48.

[3] Hargreave v. Smee, 6 Bing. 244; 19 E. C. L. R. 69.

[4] Douglas v. Reynolds, 7 Pet. 122; Lee v. Dock, 10 Id. 493; Lawrence v. McCalmont, 2 How. 449; Bell v. Bruen, 1 How. 187; Mauran v. Bullus, 16 Pet. 528; Moore v. Holt, 10 Grat. 294; Smith v. Dann, 6 Hill, 543; Mussey v. Rayner, 22 Pick. 228.

[5] Walrath v. Thompson, 6 Hill, 540.

means at ninety days' sight, and does not authorize a drawing at ninety days from date.[1] But in Massachusetts it has been held that one who is authorized to draw drafts on another "at ten or twelve days" with nothing to indicate whether ten or twelve days after date or after sight is meant, may exercise his own discretion, and consult his own convenience in that particular.[2] Where, by letter of credit addressed to the plaintiffs, Q. opened an account with them in favor of R. & Co., for a certain amount to be used by sixty days' sight drafts, "for advances to be made on consignments of merchandise" to Q.'s address, and afterward the plaintiffs by letter informed R. & Co. that Q. had opened a credit with the plaintiffs in favor of R. & Co. for that amount to be used by their drafts at sixty days' sight;—and the letter confirmed the credit, and promised that R. & Co.'s drafts should be protested, it was held that only sixty day drafts, drawn "against shipments of consignments to the address of Q." fell within the letter.[3]

§ 1757. Great diversity of opinion has arisen as to the liability of one who writes his name on the back of a note which is payable to a particular payee before such payee's name. If such an indorsement be made at a period subsequent to the original transaction, the indorser is not an original promisor but a guarantor.[4] It will be presumed, however, that such indorsement was made at the time the note was executed;[5] and as will be seen in the first volume of this work, the decisions of the courts are very diverse and conflicting as to the liability of the party making it—some regarding him as a co-maker, others as a surety, others as an indorser, and others still as a guarantor.[6]

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[1] Ulster Co. Bank v. McFarlan, 3 Den. 553.

[2] Barney v. Newcomb, 9 Cush. 47.

[3] Gelpcke v. Quentrell, 66 Barb. 617.

[4] Benthall v. Judkins, 13 Metc. 265; Union Bank v. Willis, 8 Metc. 504; Irish v. Cutter, 31 Me. 536.

[5] Benthall v. Judkins, 13 Metc. 265; Lowell v. Gage, 38 Me. 35; Camden v. M'Koy, 3 Scam. 437. Evidence is admissible to show when the signature was made. Draper v. Snow, 20 N. Y. 331. See vol. 1, § 728.

[6] See vol. 1, §§ 707 *et seq.*

Our view is this: When the note is not negotiable, such a party is to be deemed a guarantor. He cannot be an indorser, for the simple reason that there is no such thing as indorsement, in its commercial sense, of non-negotiable paper. And if he intended to be a surety, it is reasonable to presume that he would have signed conjointly with the maker, or, by the word "surety" attached to his signature, indicated an intention to assume that character. He can, therefore, only be a guarantor.

When the note is negotiable, the very opposite presumption arises. It is intended to pass current from hand to hand, and it is but natural to presume that one who assures a negotiable instrument intends to assure it to all who may become its holders, unless the contrary design appears; and that assuming the responsibility, he is also entitled to the privileges of an indorser. It is true that there is no transfer accompanying such indorsement either in point of fact or colorably, as in the ordinary case of an accommodation indorsement, and in the title as against the maker, such indorsement forms no link. But the indorser in such a case seems to us to stand in the position of a drawer whose bill is payable to the order of the payee, and which has been accepted by the maker. His indorsing in that peculiar style would indicate that it was done for accommodation of the maker, and we cannot see that this analogy between his position and that of an accommodation drawer fails in any particular.[1]

§ 1758. The guarantor of a note, who pays it upon his guaranty of payment by the payee who is also indorser, is entitled to it for his own use when he pays it to the holder; and in so doing he becomes vested with the same rights which the payee had against the maker, and no more. If the consideration as between the maker and payee has failed, he cannot recover of the maker, as he does not step in the shoes of the *bona fide* holder, to whom he paid it.[2]

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[1] See vol. 1, §§ 707, 714.

[2] Putnam v. Tash, 12 Gray, 121.

A guaranty of a note made after its execution upon a new and sufficient consideration is valid, although the note is payable to the maker's order and not indorsed by him, it having been in that condition at the time the guaranty was made.[1]

SECTION II.

THE CONSIDERATION OF GUARANTIES AND THE OPERATION OF THE STATUTE OF FRAUDS.

§ 1759. (1) *As to the consideration of guaranties.*—It is necessary to the validity of a guaranty that it should be upon a valuable consideration. There are three classes of cases which should be discriminated: (1) *When the guaranty is cotemporaneous with the principal contract.* In such a case it is not necessary that it should be a separate and distinct consideration from that upon which the bill or note was executed. It may be for the accommodation of the drawer, maker or other party, to add strength to the paper and induce the guarantee to take it, and then the value received from him embraces the guarantor as well as the principal. The credit is not given solely to either, but to both; and when the guaranty is made prior to delivery, it will be presumed to be upon consideration of the credit, and will be valid.[2]

§ 1760. (2) *When the guaranty is made after the contract is completed, and is not for the benefit of the guarantor.*—In such case, the original consideration being exhausted, there must be some new and sufficient consideration to support it, otherwise it will be void.[3] And when it is shown that the

[1] Jones v. Thayer, 12 Gray, 443.

[2] Parkhurst v. Vail, 73 Ill. 323; Draper v. Snow, 20 N. Y. 331; Manrow v. Durham, 3 Hill, 584; Leggett v. Raymond, 6 Hill, 639; Bickford v. Gibbs, 8 Cush. 184; Hopkins v. Richardson, 9 Grat. 494; Snively v. Johnson, 1 W. & S. 309; Colburn v. Averill, 30 Me. 310; Gilligan v. Boardman, 29 Me. 79; Campbell v. Knapp, 15 Penn. St. 27.

[3] Howe v. Merrill, 5 Cush. 80; Tenney v. Prince, 4 Pick. 385.

guaranty was made after the completion of the note or other contract, there is no presumption of consideration, but the contrary; and the plaintiff must prove a new and express consideration, in order to enforce it.[1] There may, however, be circumstances which show that, although the guaranty was not made until after delivery of instrument, it was designed and understood originally that it should be made, or have the effect as if made beforehand, and that it entered into the inducement to the promisee to take it; and under such circumstances it will relate back to the time when it was intended to operate, and be valid accordingly.[2] But unless this be the case, the consideration must appear, where it is necessary that it be set forth, in order to satisfy the statute of frauds.[3]

§ 1761. (3) *When the guaranty is made after the contract is completed, and is for the benefit of the guarantor.*—Thus, where a party holds a bill or note, and upon a transfer in some transaction of his own guarantees it to his transferee. In such case, the consideration moves directly to him for his own benefit; it is really his own debt that he promises to pay in a particular way, and not the debt of another. And the clause of the statute respecting a promise or engagement to pay the debt of another has no application to it.[4]

§ 1762. (II) *As to the operation of the statute of frauds.*—In the 29th year of Charles II (1667), there was enacted "The Statute of Frauds," as it is called, a provision of which was that "noe action shall be brought whereby to charge the defendant upon any speciall promise to answere for the debt, default or miscarriages of another person, unlesse the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by

[1] Tenney v. Prince, 4 Pick. 385; Klein v. Currier, 14 Ill. 237; Parkhurst v. Vail, 73 Ill. 323.

[2] Hawkes v. Phillips, 7 Gray, 284; Moies v. Bird, 11 Mass. 436.

[3] Edwards on Bills, 223.

[4] See *post*, § 1763.

the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Many questions have arisen upon the construction of this statute both in England and in the United States, in every one of which it has been copied, either precisely or in a somewhat modified form, and some of them it is necessary to consider in connection with guaranties. (1) When is a guaranty such a promise to answer for the debt of another as to come within the meaning of the statute? (2) How must it be expressed, when it comes within the statute, in order to conform to it?

§ 1763. *Firstly: When a guaranty is a promise to answer the debt of another.*—When a third person gets credit, or forbearance, upon the guaranty of another, even when it is cotemporaneous, the latter's promise is clearly "a promise to answer for" his debt, and it must comply with the statute in order to be valid. But there are cases in which a guaranty is really to answer for one's own debt, though having the appearance of a promise to answer for another's, and in such cases it is not within the statute.[1] Thus, where the defendant transferred the note of a third person, payable to him or bearer, to the plaintiff, in exchange for his own note, which plaintiff held, and at the same time indorsed a guaranty on the back of it, without expressing a consideration, it was held that, "although in form a promise to answer for the debt or default of another, in substance it was an engagement to pay the guarantor's own debt in a particular way," and that "it would be good without any writing."[2] So where a third person's note was transferred with mere verbal guaranty that it "was good and collectable," in part payment of a horse, it was held valid, because in reality a promise to pay the amount, unless the third person paid it for him.[3] This doctrine is uniformly adopted in the United States, where the

[1] Throop on Verbal Agreements, 640, § 650.

[2] Brown v. Curtis, 2 N. Y. (2 Comst.) 225.

[3] Cardell v. McNiel, 21 N. Y. 336 (1860); see also Fowler v. Clearwater, 35 Barb. 143 (1861); Dauber v. Blackney, 38 Barb. 432 (1862).

guaranty is upon a pre-existing consideration, as well as where it is for a debt contracted, goods sold, or obligations exchanged, at the time the guaranty is made.[1] Where one who sells a note guarantees its payment, the guaranty is an original undertaking, and need not be written.[2]

§ 1764. *Secondly: As to the terms of the guaranty.*—It has been held uniformly in England, that when the guaranty is to answer the debt of another the consideration must be expressed, as well as the promise, to satisfy the word "agreement" in the statute, and that parol evidence is inadmissible to supply it.[3] This view rested upon the ground that the word agreement was used in the sense of a mutual contract, and that it was necessary for the consideration, without which there is no contract, to appear upon the face of the writing, in order to the existence of a written agreement. In the United States a number of cases have adopted this reasoning;[4] but the word agreement signifies, in its ordinary acceptation, the thing agreed upon, and it would seem that if the thing agreed upon was in writing the statute would be complied with. It is true that the formal compact is technically an agreement; but the word would seem to have been used in its popular and ordinary sense, rather than as a technicality, being intended to apply to all manner of contracts among the people; and the opinion predominates in this country that if the promise is written it is sufficient.[5]

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[1] Beaty v. Grim, 18 Ind. 131 (1862); Malone v. Keener, 44 Penn. St. 107 (1862); Dyer v. Gilson, 16 Wis. 557 (1863); Huntington v. Wellington, 12 Mich. 10 (1863); Thurston v. Island, 6 R. I. 103 (1859); Hopkins v. Richardson, 9 Grat. 485 (1852); Hall v. Rodgers, 7 Humph. 536 (1874); Rowland v. Rorke, 4 Jones (N. C.) 337 (1857); Johnson v. Gilbert, 4 Hill, 178; Meech v. Smith, 7 Wend. 315.

[2] Meech v. Smith, 7 Wend. 315; Hunt v. Adams, 5 Mass. 358.

[3] Wain v. Walters, 5 East, 10; Saunders v. Wakefield, 4 Barn. & Ald. 595; Jenkins v. Reynolds, 3 Brod. & Bing. 14; Morley v. Boothby, 3 Bing. 107; Newbury v. Armstrong, 6 Bing. 201; Alnutt v. Ashenden, 5 Man. & G. 392.

[4] Henderson v. Johnson, 6 Ga. 390; Elliott v. Giese, 7 Harris & J. 457; Rigby v. Norwood, 34 Ala. 129; Simons v. Steele, 36 N. H. 73; Sears v. Brink, 3 Johns. 210; Leonard v. Vredenburgh, 8 Johns. 29; Nichols v. Allen, 23 Minn. 543.

[5] Packard v. Richardson, 17 Mass. 122, Parker, C. J.; Smith v. Ide, 3 Vt. 390;

§ 1765. In those States where the consideration is not required to be expressed, the name of the party in blank is often regarded as a sufficient writing to satisfy the statute, the signature applying to the contract already written, or to the words above the signature, which are afterward written by implied authority—as, for instance, where one not the payee of a note indorses it when it is made.[1] This is we think the correct view; but there is also another ground on which such party may be held, that is, that such a party is an indorser, and that the statute has no application to these cases which come peculiarly within the rules of the law merchant.[2]

Where the statute only requires the "promise" to be in writing, it is not necessary for the consideration to appear.[3]

§ 1766. Where it is held that the consideration must appear in the guaranty of another's debt, it is nevertheless not necessary that it be set out at length; but sufficient, if it appear by reasonable intendment. Thus, "I hereby guarantee the present account of Miss H. M., due to B. & Co, of £112 4 4, and what she may contract from this date to 30th of September next," was held a sufficient indication of the consideration; which was for a future as well as past credit, and it was not necessary that the consideration and promise should be co-extensive.[4] So, "in consideration of your being in advance to Messrs. Lees and Sons, in the sum of £10,000, for the purchase of cotton, I do hereby give you my guaranty for that amount in their behalf."[5] So, "You will please be so good as to withdraw the promissory note, and I will see you

Gillighan v. Boardman, 29 Me. 79; Sage v. Wilcox, 6 Conn. 81; Reed v. Evans, 17 Ohio, 128; Buckley v. Beardslee, 2 South, 570; Ashford v. Robinson, 8 Ired. 114; Wren v. Pearce, 4 Sm. & M. 91; Little v. Nabb, 10 Mo. 3.

[1] Perkins v. Catlin, 11 Conn. 213; Nelson v. Dubois, 13 Johns. 175; Moies v. Bird, 11 Mass. 436.

[2] See Chapter XIX, § 567 and notes, vol. 1; Throop on Verbal Agreements, 159, §§ 85, 86.

[3] Colgin v. Henley, 6 Leigh, 85; Taylor v. Ross, 3 Yerg. 330; Pearce v. Wren, 4 S. & M. 91; Violett v. Patten, 5 Cranch, 142; Edwards on Bills, 240, 241.

[4] Russell v. Moseley, 3 B. & B. 211. [5] Haigh v. Brooks, 10 Ad. & El. 309.

at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making, on the whole, £45."[1] So it was held, that the consideration, which was a forbearance to sue, was sufficiently manifest where the plaintiff having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to plaintiff a bill accepted by W. at two months, inclosed in a letter, wherein defendant said: "W. being again disappointed in receiving remittances, and you expressed yourself inconvenienced for money, I inclose you his acceptance at two months," and the plaintiff refusing the bill, unless defendant put his name to it, the latter wrote on the back of the letter: "I will see the bill paid for W."[2]

§ 1767. In New York, it was formerly held, that if the original contract and the guarantee were cotemporaneous, and the guaranty therefore an essential inducement to the credit given, it would not be necessary to show any other consideration than that moving between the parties to the original contract; and that whether the guaranty were on the same or a separate paper, it need not disclose a distinct consideration.[3] Subsequently the statute of frauds was so amended in that State as to require the consideration to be expressed in writing, and since then a stricter interpretation has obtained. Thus where a party wrote under a promissory note simultaneously with its execution, and the consideration was granted upon the credit of his name: "I hereby guarantee the payment of the above note," the guaranty was held void because no consideration was expressed.[4] But where the consideration is required to be expressed, it need not be defined; and therefore the words "value received" are

[1] Shortrede v. Cheek, 1 Ad. & El. 57.

[2] Emmatt v. Kearns, 5 Bing. N. C. 559.

[3] Leonard v. Vredenburgh, 8 Johns. 29; Barley v. Freeman, 11 Johns. 221; Nelson v. Dubois, 13 Johns. 175; approved in D'Wolf v. Rabaud, 1 Pet. 476.

[4] Brewster v. Silence, 11 Barb. 144; 4 Seld. 207. See also Glen Cove Mut. Ins. Co. v. Harrold, 20 Barb. 293; Draper v. Snow, 20 N. Y. 331.

deemed a sufficient expression of it.[1] If a guaranty be under seal, the consideration is conclusively imported.[2]

SECTION III.

FORMS AND VARIETIES OF GUARANTIES.—ABSOLUTE AND CONDITIONAL GUARANTIES.

§ 1768. The guaranty of a bill or note need not be in any particular form, and it is governed usually by the same rules which apply to other guaranties.

A guaranty is generally, and when it is to answer for the debt of another, it must be written. But there may be valid verbal guaranties. When written, it may be: (1) By a separate instrument; or (2) by writing on the instrument guaranteed; and it may be (3) sealed or unsealed.

When it is written on the instrument guaranteed, its very presence is identification of the contract referred to; but when on a separate paper, it must describe with sufficient accuracy the bill or note or other contract it refers to.

And as to the varieties of guaranty.—A guaranty may be (1) general or special; (2) absolute or conditional; (3) limited or unlimited; and (4) temporary or continuing. A general guaranty is a guaranty to whomsoever may accept the proffer made. A special guaranty is a guaranty to a particular person.

§ 1769. In the *second place*, as to absolute and conditional guaranties. If A. guarantees, expressly or by implication, to pay the note of B. to C., provided B. does not pay it, he becomes absolutely liable for its payment immediately upon B.'s default, and is therefore deemed an absolute guarantor of the due payment of the note by B. to C.[3] But if A.

[1] Brewster v. Silence, 11 Barb. 144; Douglass v. Howland, 24 Wend. 35; Watson v. McLaren, 26 Id. 425; Day v. Elmore, 4 Wise. 190.

[2] Bank of Tennessee v. Barksdale, 5 Sneed, 73; Crocker v. Gilbert, 9 Cush. 131.

[3] Dickerson v. Derrickson, 39 Ill. 575; Allen v. Rightmere, 20 Johns. 365; Arents v. Commonwealth, 18 Grat. 770.

guarantees the collectibility or goodness of B.'s note to C., he does not absolutely guarantee its payment, but only that he will pay it in the event that C. shall test the collectibility or goodness of the note by regular prosecution of suit against B., and shall be unable, by due and reasonable diligence, to enforce its payment. And accordingly he is only deemed a conditional guarantor of payment.[1]

And he is always deemed only a conditional guarantor of payment when there is some extraneous event, beyond the mere default of the principal, upon which the guaranty becomes binding.[2]

The words, "I guarantee the collection of the within note,"[3] and "I promise that this note is good and collectible after due course of law,"[4] and "I warrant this note good,"[5] are phrases of similar import, binding the guarantor only upon condition that the guarantee acts with due diligence in prosecuting the collection of the note.

But if the principal were insolvent, suit would be vain, and need not be brought.[6] And so, if he remove from the State where the contract was made.[7] But if the principal resided in a foreign State when the contract was made, the guarantee would then be required to proceed against him before pursuing the guarantor.[8]

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[1] 2 Am. Leading Cases, 129, 133.

[2] Dickerson v. Derrickson, 39 Ill. 575. The guaranty was: "I do hereby agree, in case G. K. does not pay R. P. D. $325 in three months from date, to guarantee to said D. the payment of said sum of money." Walker, C. J., said: "In this case the parties have only clothed in language what the law implies in all mere absolute guaranties. The contract of an absolute guarantor is, that if the principal fails to pay, the guarantor will. If it were not so, it would not be a guaranty, but an independent undertaking."

[3] Loveland v. Shepherd, 2 Hill, 139. [4] Moakley v. Riggs, 19 Johns. 69.

[5] Curtis v. Smallman, 14 Wend. 231; Cumpston v. McNair, 1 Wend. 457.

[6] Camden v. Doremus, 3 How. 515; M'Doal v. Yeomans, 8 Watts, 361; Sanford v. Allen, 1 Cush. 473.

[7] Cooke v. Nathan, 16 Barb. 342; White v. Case, 13 Wend. 543.

[8] Burt v. Horner, 5 Barb. 501.

SECTION IV.

LIMITED AND UNLIMITED, AND TEMPORARY AND CONTINUING GUARANTIES.

§ 1770. A guaranty may be limited or unlimited in respect to the amount guaranteed. It may be limited to a single transaction. It may be limited within a certain period of time. And it may be a continuing or standing guaranty, applying to successive transactions, without limit as to time. Where A. & B. addressed a letter of credit to C., saying: "If D. wishes to take goods of you on credit, we are willing to lend our names as security for any amount he may wish," it was held unlimited as to the amount, but not continuing beyond the first parcel of goods delivered to D., there being no words to show that successive transactions were contemplated.[1] So, where the agreement was to be answerable "for the payment of £50 for T. L., in case T. L. does not pay for the gin he received from you," it was held limited to the single purchase of £50 worth of gin.[2] So, where it ran: "I hereby guarantee Mr. J. J.'s account with you for wine and spirits to the amount of £200;[3] and where it guaranteed A. "to the extent of sixty pounds, at quarterly account, bill two months, for goods to be purchased for him of B."[4] Where the wife of C., a retail trader, owning property in her own right, gave the plaintiff, with whom C. dealt, the following guaranty: "In consideration of you having, at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you the sum of £500. This guaranty to continue in force for the period of six years, and no longer," it was held that the guaranty did not cover sums due for goods supplied before its date, but was limited to goods sold after its date, to the value of £500.[5]

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[1] Rogers v. Warner, 8 Johns. 92.

[2] Nicholson v. Paget, 1 Cr. & M. 48. But *quære*, Mayer v. Isaac, 6 M. & W. 605.

[3] Allnutt v. Ashenden, 5 M. & Gr. 392.

[4] Melville v. Hayden, 3 Barn. & Ald. 593.

[5] Morrell v. Cowan, 7 Ch. Div. 151.

§ 1771. Where the letter of credit ran: "The object of the present letter is to request you, if convenient, to furnish them (S. & H. H.) with any sum they may want, as far as fifty thousand dollars, say fifty thousand dollars," it was held to be limited to a single advance of $50,000, and that when that sum was once advanced, the guaranty was exhausted.

"The language of a letter," said Story, J., "should be very strong that would justify the court in holding the guaranty to be a continuing guaranty, which is to cover advances from time to time to the stipulated amount, *toties quoties*, until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and in every doubtful case, I think that the presumption ought to be against it."[1]

Where the guaranty was as security "to the amount of £10,000 on certain acceptances, or any other account thereafter to subsist between A. & B.," it was held to cover all transactions up to the amount of £10,000, but none beyond.[2]

§ 1772. In the foregoing cases, it will be observed that there were no such expressions of continuing credit, as "from time to time," or "at any time," or for "any debt," &c.,—and where such expressions are used, they are regarded as extending the guaranty to several and successive transactions.

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[1] Cremer v. Higginson, 1 Mason, 323.

[2] Sansome v. Bell, 2 Camp. 39. In Ranger v. Sargent, 36 Tex. 26, it appeared that R. & Co. were sued on a draft drawn September 3d, 1866, on the faith of a letter of credit as follows: "The bearer, W. H. R., is authorized to draw on us for six hundred dollars specie. Houston, August 31st, 1866. R. & Co." They pleaded that, since the giving of the letter of credit, they had paid to W. H. R., and to his order, more than the sum specified in the letter of credit, whereby the authority conferred by said letter had been exhausted; and that the plaintiff, by the exercise of ordinary diligence, could have ascertained these facts. *Held*, to be a good defense. That though the instrument sued on was a general letter of credit, in that it was directed to no particular person, and limited to no time or place, yet it was special in that it was limited in amount, and a party making advances on it was bound to make inquiry whether it had been paid, or the authority to draw exhausted; and *held further*, that when the defendants delivered the letter of credit, it became the absolute property of the holder, and they lost all control over it."

Thus a guaranty of "any debt, A. B. may contract in his business as jeweler, not exceeding one hundred pounds, after this date,"[1] or to A. "for any goods, he hath, or may supply my brother W. P. with to the amount of £100,"[2] has been held to be limited only in respect to the amount guaranteed at any one time, and to apply to any sum or goods not over £100, which might be advanced from time to time. Lord Ellenborough said, in the first of the cases just cited: "The guaranty is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the special amount."[3] The like decision was rendered upon a guaranty of "any bills you may draw on him on account, &c., to the amount of £200."[4] So where it was, "to the extent of £300, for any tallow or soap supplied by B. to F."[5]

§ 1773. In the United States, the like course of adjudication has been followed. Where the guaranty ran, "I will be responsible for what stock McK. has had, or may want hereafter, to the amount of five hundred dollars," it was held to embrace successive advances of five hundred dollars, each.[6] And in a leading case before the United States Supreme Court, where the letter of credit recited that the bearer "might require your aid from time to time," and promised "to be responsible at any time for a sum not exceeding eight thousand dollars," the expressions "from time to time," and "at any time," were thought decisive of its being a continuing guaranty of several and successive advances of eight thousand dollars.[7]

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[1] Merle v. Wells, 2 Camp. 413.
[2] Mason v. Pritchard, 2 Camp. 436.
[3] Merle v. Wells, 2 Camp. 413.
[4] Mayer v. Isaac, 6 M. & W. 605.
[5] Barton v. Bennett, 3 Camp. 220.
[6] Gates v. McKee, 3 Kern. 237.
[7] Douglass v. Reynolds, 7 Pet. 113. See 2 Am. Lead. Cas. 38 *et seq.*

SECTION V.

THE NEGOTIABILITY OF GUARANTIES.

§ 1774. *In the first place: As to the negotiability of guaranties not written upon negotiable instruments.* It seems to be settled, by weight of authority, that when the guaranty is written upon a separate paper, unless it were addressed in such a manner as to denote that it was intended to guarantee the bill or note to every holder, it would not be negotiable; and that if addressed to a particular person only, it would be a mere personal contract limited to that person.[1] And when no person's name is mentioned in such a guaranty, it will be regarded as limited to the first person who takes the note, and relies on the guaranty.[2] But in either case—and in any case of the guaranty of a bill or note—the party to whom the guaranty is originally made, may, in equity, assign his right to the holder at the same time that he transfers the bill or note, and thereby invest him with the equitable, although not the legal, title thereto.[3]

§ 1775. In New York the doctrine was urged by Senator Verplanck, in a dissenting opinion of great learning and ability, that although the guaranty of a negotiable instrument be upon a separate paper, and be not expressed in negotiable words, it ought to be held negotiable in the same manner and to the same extent in favor of each successive holder.[4] And while the weight of authority is to the contrary it is difficult, and in our judgment impossible, to answer satisfactorily the cogent reasoning upon which this view is based.

§ 1776. *In the second place, as to guaranties written upon the paper cotemporaneously with its execution.*—When the

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[1] McLaren v. Watson's Ex'rs, 19 Wend. 559; s. c. 26 Wend. 425; Story on Notes, § 484; 2 Am. Lead. Cas. 314; 2 Rob. Prac. (n. ed.) 298, 299.

[2] Story on Notes, § 484.

[3] Arents v. Commonwealth, 18 Grat. 770; Story on Bills, § 457.

[4] McLaren v. Watson's Ex'rs, 26 Wend. 431 *et seq.*

guaranty is made at the time the paper is executed and delivered, there are numerous authorities which hold that where it is not expressed in negotiable words, the mere fact that it is written upon a negotiable instrument does not impart to it any negotiability, and no action can be maintained upon it by any subsequent holder thereof. It was so held in Massachusetts where, underneath the signature of the payee of a note indorsed by him, the defendant wrote: "I guarantee the payment of semi-annual interest on this note as well as the principal."[1] So in Michigan where the defendant McCauley, cotemporaneously with the execution of the note, made by Sayer payable to Soule, wrote on the back: "For value received, I hereby guarantee the payment of the within note," and Soule, the payee, indorsed it to the plaintiff, it was held he could not recover, the guaranty not being negotiable.[2] But in such cases it will be presumed, unless the contrary appears, that the guarantor of a note for accommodation contracted with the party who sues upon it, and it will not be necessary for him to prove affirmatively that he was the first holder for value.[3]

§ 1777. But, on the other hand, there are cases which maintain that, although the guaranty on the paper, written at the time of delivery, specifies no person to whom the guarantor undertakes to be liable, and has no negotiable words, it runs with the instrument to which it refers, partakes of its quality of negotiability, and any person having the legal interest in the instrument takes in like manner the guaranty as an incident, and may sue thereon.[4] And it has been said, in such a case "this view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper."[5] This seems

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[1] True v. Fuller, 21 Pick. 140 (1838).

[2] Tinker v. McCauley, 3 Mich. 188 (1854), overruling Higgins v. Watson, 1 Mich. 420; see also Small v. Sloan, 1 Bosw. 353 (1857).

[3] Northumberland County Bank v. Eger, 58 Penn. St. 97.

[4] See Cooper v. Dedrick, 22 Barb. 516, for law of New York.

[5] Webster v. Cobb, 17 Ill. 466 (1856); Skinner, J.; see Arents v. Commonwealth, 18 Grat. 770.

to us the better doctrine. By writing the guaranty on the paper, the guarantor evidences his intention to guarantee the contract of the maker. That contract being negotiable, is made with any and every person who may be the holder, and the guarantor is thus brought in privity with any and every person who becomes the holder.[1] The foregoing views of the text were recently approved in Indiana, in the case of a note where above the name of the payee and indorser there was written the words: "We jointly or severally, for value received, hereby guarantee the prompt payment of the within note," signed by two persons, and suit was brought by the indorsee of the payee against the guarantors.[2]

§ 1778. Judge Story says that "with a view to the convenience and security of merchants, as well as the free circulation and credit of negotiable paper, it would seem that such a guaranty upon the face of a bill of exchange, not limited to any particular person, but purporting to be general, without naming any person whatsoever, or purporting to be a guaranty to the payee or his order, or to the bearer, ought to be held, upon the very intention of the parties, to be a complete guaranty to every successive person who shall become the holder of the bill."[3]

On the contrary, Prof. Parsons says: "Our view of this question is this: The negotiability of paper payable to order is established by a very peculiar exception to the general law of contracts; and this exception rests upon a usage so ancient and universal as to show a distinct and urgent need

[1] McLaren v. Watson's Ex'rs, 26 Wend. 430 (1841), Walworth, Chancellor, saying: "A guaranty indorsed upon a negotiable note, whereby the guarantor agrees with the holder of the note that he will be answerable that the note shall be paid to him or to his order, or the bearer thereof, when it becomes due, is probably negotiable by the transfer of the note upon which it is written; for it is in fact a special indorsement of the note, or more properly a negotiable note in itself. But to make a guaranty negotiable as a part of the note to which it relates, it must be on the note itself, or at least it must be annexed to it, in the nature of *un allonge*, or eking out of the paper upon which the note is written."

[2] Cole v. Merchants' Bank, S. C. of Indiana, American Law Register, Nov. 1878, p. 703.

[3] Story on Bills, § 458.

of it. But the negotiability of a guaranty has no such usage in its favor, and is not, therefore, within the exception. Moreover, we do not think it likely to be brought within this usage, or on other grounds established by adjudication, because all exceptions are to be limited by the necessity for them; and we see no necessity for any such rule, inasmuch as all the good which could be gained from making guaranties negotiable may be derived, and is now in part derived, from the practice and the law of indorsement."[1] But we cannot concur with this eminent jurist as to the inutility of a negotiable guaranty. There is no form of indorsement by which the liability of a guarantor can be engrafted upon, and made negotiable with, a negotiable instrument. An indorser in the ordinary form is absolutely discharged by want of exact demand and notice. A guarantor is only entitled to reasonable notice, and is only discharged to the extent that he would otherwise be injured. If the indorser waives demand and notice, he is entitled to no demand or notice whatever, and thus he makes the indorsement more onerous than that of guaranty. A negotiable guaranty is an engagement intermediate between that of an indorsement in the ordinary form, and one waiving demand and notice; and when a party intends to enter into such an engagement, there is certainly nothing in the policy of the modern law which should prevent it.

§ 1779. In some cases it has been held that a guaranty of payment, indorsed on the back of a negotiable note at the time it was made, rendered the guarantor liable to the payee, and to every subsequent *bona fide* holder, as a joint and several maker of the note.[2] But this doctrine, as has been said, "originated in, and has always been confined to, New York."[3] And there it no longer obtains.[4]

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[1] 2 Parsons N. & B. 133, 134.

[2] Hough v. Gray, 19 Wend. 202; Ketchum v. Gray, 24 Wend. 456; Luqueer v. Prosser, 1 Hill, 256; 4 Hill, 420.

[3] Tucker v. McCauley, 3 Mich. 194, Douglass, J.

[4] Brown v. Curtis, 2 Coms. 225; Durham v. Manrow, Id. 533; Brewster v. Silence, 14 Barb. S. C. 144; Draper v. Snow, 20 N. Y. 331; Glen Cove Mut. Ins. Co. v. Harrold, 20 Barb. 298.

§ 1780. In the foregoing cases, the words only imported a secondary obligation; and when they are absolute in their terms, an absolute effect will be given them. For a party signing on the back of a note may make an absolute negotiable promise to pay it, as well as on its face. Where C. and D. indorsed on the back of a note from A. to B. at the time it was made: "For value received, we jointly and severally undertake to pay the money within mentioned, to the said B." (the payee), they were held as original promisors.[1] So an indorsement, with the words "holders on the within," makes the indorser an original promisor.[2] So do the words indorsed: "I will see the within paid."[3] And where the note was written: "We, A. as principal, and B. as surety, promise, &c.," and was signed by A. and indorsed by B., the latter was held as joint maker.[4]

§ 1781. *In the third place: as to guaranties written on the paper by the transferrer at the time of the transfer.* In such cases the better opinion, as it seems to us, is that the transferrer combines the liability of indorser and guarantor. He transfers the instrument, and indorses it, by which he becomes liable as indorser by due demand and notice, and he superadds a guaranty which renders him liable without demand or notice upon default of the principal. In Vermont, it appeared that the payee of a negotiable note transferred it for value, and wrote on the back, over his signature, "I guarantee the payment of the within note." The plaintiff, a remote transferee sued; and it was held that he could recover, on the ground that the indorsement of the payee transferred the legal title in the note to every subsequent holder, notwithstanding the person to whom the note was first transferred was not named in the indorsement, and it was not made in terms payable to order or bearer. Further, that such indorsement rendered the payee liable as an indorser to

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[1] White v. Howland, 9 Mass. 314.

[2] Brett v. Marston, 45 Me. 401.

[3] Amsbaugh v. Gearhart, 11 Penn. St. 482.

[4] Palmer v. Grant, 4 Conn. 389.

any holder; also as a guarantor without proof of demand and notice, and that the guaranty passed to every holder.[1]

§ 1782. But other authorities hold that a guaranty written on a note by the transferrer, naming no one as promisee, could only be operative in favor of the party who first took the instrument on the faith of it.[2] In Massachusetts,[3] the payee of a note wrote on the back, over his signature, "I hereby guarantee the within note." Suit was brought by a subsequent holder. The court held that this was not such an indorsement as authorizes such holder to sue, and referring to a previous case,[4] said: "It is true there was the further objection in that case, that the guaranty was signed not only by the payee of the note, but also by another person. But irrespective of that, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name as indorsee."

The view has been taken in some cases that a guaranty by the transferee operates as a strict guaranty as between transferrer and transferee, and does not pass to subsequent holders; but that as to them it operates as an assignment of the note, so far as to enable them to sue other parties than the guarantor.[5]

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[1] Partridge v. Davis, 20 Vt. 500 (1848); see also Heaton v. Hulbert, 3 Scam. 489.

[2] Nevins v. Bank of Lansingburgh, 10 Mich. 547.

[3] Belcher v. Smith, 7 Cush. 482 (1851); Taylor v. Binney, 7 Mass. 481 (1811) is to same effect. But Upham v. Prince, 12 Mass. 14, seems to uphold the doctrine of the text.

[4] Tuttle v. Bartholomew, 12 Metc. 454 (1847). Dewey, J.: "A different view of this question seems to have been taken in the case of Blakely v. Grant, 6 Mass. 386, which was an action upon a bill of exchange. This case was decided a year previous to that of Tyler v. Binney, but does not appear to have been referred to in the argument or decision of the latter case. In the case of Blakely v. Grant, it was held that a signature of the payee to the following words 'should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in addition to the principal, twenty per cent. damages,' might operate as a transfer of the bill of exchange, and that the indorsement was good, though no person was named as indorsee; and that a *bona fide* holder might insert above such stipulation a direction to pay the contents to his order."

[5] Myrick v. Hasey, 27 Me. 12; see Upham v. Prince, 12 Mass. 14.

§ 1783. In Massachusetts, where the payee of a note transferred it with the words, "I guarantee the payment of this note within six months," the Court said: "The defendant's engagement amounts to a promise that the note should at all events be paid within six months. Now this promise may not be assignable in law; and yet the note itself may be assignable by the party to whom it was so transferred, so that, upon non-payment of it by the promisor, the holder would have a right of action against Prince as indorser."[1]

§ 1784. Where the holder transfers the note and guarantees the collection, the doctrine has been held that the intention is manifested to make simply a special contract, and not to become liable as an indorser. Thus, where a note payable to S. B. or bearer was transferred by L. with the words, "I warrant the collection of the within note, for value received," over his signature, and it passed into the hands of a subsequent holder from the transferee, it was held that he could not maintain suit.[2] Where the payees of a note wrote on the back of it: "We guarantee the payment of the within note at maturity," it was held that they became jointly and severally liable without demand or notice, and that it was their duty to seek the holder and pay him.[3]

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[1] Upham v. Prince, 12 Mass. 15 (1815).

[2] Lamourieux v. Hewit, 5 Wend. 308, Savage, C. J.: "I am of opinion that an action cannot be maintained on the guaranty in the name of the present plaintiff. The defendant was liable upon his guaranty, not as an indorser of negotiable paper, but as the party to a special contract, which might have been written on a separate piece of paper as well as on the back of the note. The contract was made with Tuttle, and any action upon it must be in the name of Tuttle. Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note." Vanderveer v. Wright, 6 Barb. 547.

[3] Gage v. Mechanics' Nat. Bank, 79 Ill. 62.

SECTION VI.

REQUISITES TO THE ESTABLISHMENT AND PRESERVATION OF GUARANTOR'S LIABILITY.

§ 1785. *As to notice of acceptance of guaranty.*—When the guaranty is made through personal treaty between the guarantor and guarantee, and whenever the fact that the guarantee has accepted the proffer of the guarantor is equally in the knowledge of both parties, no notice that he accepts the guaranty need be given by the guarantee, for the simple reason that it is already known to the guarantor.[1] This rule applies where there is a guaranty of a specific existing demand, such as a bill or note;[2] but when a proposition for a guaranty is made, it must, like any other proposition for a contract, be accepted before it is binding; and the guarantee must notify his assent in some form, for both minds must concur in order to constitute a contract.[3] And when the guaranty is of a general character, addressed at large to any person, without limit as to amount or time, it is regarded rather as a proposition than as a contract, and notice of its acceptance should be given by the party acting upon it.[4]

A series of decisions by the United States Supreme Court has established the further doctrine that when a letter of credit is addressed to a particular person, or is placed in the hands of the debtor, expressly or impliedly addressed to all the world, and such letter contemplates future and prospective guaranties, notice of its acceptance is necessary, because without it he could neither know to whom he was liable nor to what amount. And it is necessary, in order that he may be put on his guard against losses, and avail himself of the appropriate means of protection.[5] The State tribunals have

[1] Lent v. Padelford, 10 Mass. 230; Wildes v. Savage, 1 Story, 22; Walker v. Forbes, 25 Ala. 139.

[2] Montgomery v. Kellogg, 43 Miss. 486; Thrasher v. Ely, 2 Smedes & M. 147.

[3] Jackson v. Yendes, 7 Blackf. 526; Sheurll v. Knox, 1 Dev. 404; 2 Am. Lead. Cas. 104; 2 Rob. Prac. (n. ed.) 292.

[4] Mussey v. Rayner, 22 Pick. 229; Montgomery v. Kellogg, 43 Miss. 486.

[5] Adams v. Jones, 12 Pet. 207; Douglas v. Reynolds, 7 Pet. 113; Edmundson

generally adopted the same doctrine,[1] and it may be regarded as the prevailing view of the law, although it has been sharply criticised,[2] and it has been declared that it has no foundation in English jurisprudence.[3] Knowledge derived from circumstances will be equivalent to notice, unless injury has been caused by want of earlier information,[4] and notice may be inferred from circumstances;[5] and when the guaranty has been accepted, it is not necessary to give notice of each particular advance made in accordance with it.[6]

§ 1786. *Demand upon principal and notice of default to guarantor.*—When the guaranty depends upon the happening of a contingent event, it is necessary when the event has occurred that notice should be given to the guarantor within a reasonable time in order to enable him to secure himself against loss.[7] But when the guaranty is an absolute engagement to pay in the event that the principal does not pay, the authorities differ as to the necessity of demand or notice at any time in order to preserve the liability of the guarantor. By one class of authorities it is contended that where one transfers a promissory note and guarantees its payment, proof of demand and notice of non-payment is unnecessary; that the guarantor is the debtor of the holder, and it is his duty to seek the creditor and pay the debt the very day it is due; and that his undertaking is absolute to

v. Drake, 5 Pet. 624; Lee v. Dick, 10 Pet. 482; Russell v. Clarke, 7 Cranch, 69; Wildes v. Savage, 1 Story C. C. R. 22.

[1] Bradley v. Carey, 8 Me. 234; Tuckerman v. French, 7 Me. 115; Norton v. Eastman, 4 Me. 521; Craft v. Isham, 13 Conn. 28; Rapelye v. Bailey, 3 Conn. 438; Babcock v. Bryant, 12 Pick. 133; Montgomery v. Kellogg, 43 Miss. 486; Oaks v. Miller, 13 Vt. 106; Lowry v. Adams, 22 Vt. 166 (overruling Train v. Jones, 11 Vt. 44); Kincheloe v. Holmes, 7 B. Mon. 5; Lowe v. Beckwith, 14 Ib. 184; Rankin v. Childs, 9 Mo. 674; Taylor v. Wetmore, 10 Ohio, 490; Hill v. Calvin, 4 How. (Miss.) 231; Central Savings Bank v. Shine, 48 Mo. 461.

[2] 2 Am. Lead. Cas. 77, 99.

[3] Douglas v. Howland, 24 Wend. 50; see also Smith v. Dann, 6 Hill, 543; Caton v. Shaw, 2 H. & Gill. 13; White v. Stacker, 1 Sneed, 169.

[4] Norton v. Eastman, 4 Me. 521.

[5] Oaks v. Weller, 13 Vt. 106; Lowry v. Adams, 22 Id. 160.

[6] Douglas v. Reynolds, 7 Pet. 126; Lowe v. Beckwith, 14 B. Mon. 184.

[7] Dickerson v. Derrickson, 39 Ill. 577; Clay v. Edgerton, 19 Ohio St. 553; Montgomery v. Kellogg, 43 Miss. 486.

pay the note when due if the maker does not then pay it. And that proceedings against the maker and notice to the guarantor are only necessary when there is a guaranty of collection which is a conditional agreement to pay if the money cannot be collected from the maker.[1]

§ 1787. By another class of cases it is maintained that as the non-payment of the debt must come peculiarly within the knowledge of the guarantee, the guarantor is entitled to require demand upon the maker within a reasonable time, and notice of non-payment within a reasonable time after de-

[1] Allen v. Rightmere, 20 Johns. 366; Brown v. Curtis, 2 Coms. 228; Heaton v. Hulbert, 3 Scam. 490; Wright v. Dyer, 48 Mo. 526; Voltz v. Harris, 40 Ill. 159; Clay v. Edgerton, 19 Ohio St. 553. In this case the holder transferred the paper, indorsing thereon the words, "I guarantee the payment of the within note to C. Edgerton or order." Brinckerhoff, C. J., said: "In the second place, it is argued by counsel for plaintiffs in error that the petition is insufficient, because it contains no allegations of demand by Edgerton upon Hoot, the maker of the note, for payment thereof, and notice to Clay of non-payment.

"On this point much confusion has doubtless arisen from a failure to discriminate between a guaranty which depends on some contingency or condition, and one which is in its terms absolute and unconditional. Where a guaranty is dependent on some condition or contingency expressed in, or fairly implied from, the terms of the contract of guaranty, a compliance with those terms on the part of the guarantee is necessary, and must be alleged and proved in order to a recovery upon it. But where the guarantee of payment is absolute and unconditional, we are of opinion that it is not necessary, in order to make out a *prima facie* case for recovery, to aver or prove either demand or notice. This, we think, is fairly inferrible from what is said by this court in Bashford v. Shaw, 4 Ohio St. 266. And this view of the question is directly ruled in Allen v. Rightmere, 20 Johns. 365; Brown v. Curtiss, 2 Coms. 225; Breed v. Hillhouse, 7 Conn. 523; Read v. Cutts, 7 Greenl. 186; and Heaton v. Hulbert, 3 Scam. (Ill.) 489. We are aware that cases may be found in which the point has been ruled otherwise; but it seems to us that the reasoning of Bronson, J., in Brown v. Curtiss, *supra*, is unanswerable and irresistible. And there is nothing either in Bashford v. Shaw, *supra*, or in Forest v. Stewart, 14 Ohio St. 246, adverse to this conclusion; and what is said by the court in Greene v. Dodge & Cogswell, 2 Ohio, 431, related to a case in which the court construed the contract of guaranty sued on to be a conditional one. Now the contract of guaranty in the case before us is absolute and unconditional. Its language is: 'I guarantee the payment of the within note to C. Edgerton or order,' and we are of opinion that no averment of demand or notice in the petition was necessary; and if any loss had resulted to the guarantor by reason of any laches on the part of the guarantee, such laches, if it could be made available at all, would be matter of defense to be set up by the guarantor."

fault.[1] This seems to us the correct doctrine; and the great body of the cases which maintain the contrary view seem to have grown out of the idea which has obtained in New York, that the guaranty of a note is an absolute, and not a collateral and conditional engagement. In an Iowa case, where the defendant was sued as guarantor of a note upon which was written: "For value received, I hereby guarantee the payment of the within," it was said by Day, J.: "If the principal fails to pay when he should, the guarantor must be informed in a reasonable time, soon enough to give him such opportunities as he ought to have to save him from loss. If the notice be delayed a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But, if the delay were for a long period, and it was, nevertheless, clear that the guarantor would have derived no benefit from an earlier notice, the delay would not impair his obligation." [2]

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[1] Douglas v. Reynolds, 7 Pet. 126; 12 Id. 523. Story, J.: "The fourth instruction insists that a demand of payment should have been made of Haring, and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendant, otherwise the defendants would be discharged from their guaranty. We are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements are indispensable to constitute a *casus fœderis*. The creditors are not, indeed, bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due. The case of Allen v. Rightmere (20 Johns. 265) is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he indorsed it with a special guaranty of its due payment; and the court held this engagement absolute, and not conditional." Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 535; Cannon v. Gibbs, 9 Sergt. & R. 202.

[2] Second National Bank v. Gaylord, 34 Iowa, 248; Rodabaugh v. Pitkin, 46 Iowa, 545.

§ 1788. But the authorities which regard demand upon the principal, and notice of default, as necessary to render the guarantor's liability absolute, do not contemplate that punctual demand and immediate notice which are necessary to charge an indorser. Nor do they consider that either the demand, or notice at any time are absolute conditions precedent. The guarantor is only entitled in any event to exact demand and notice of default within a reasonable time—such time depending upon all the circumstances of the case; and although they be neglected altogether, the guarantor will only be discharged provided he has suffered loss, and then only to the extent of such loss. For if he could not have profited by demand, or by notice of default, and has lost nothing for want of them, there is no reason why he should complain.[1]

When the principal is insolvent at maturity of the debt, and so continues, there is a presumption that the guarantor has sustained no injury by delay as to demand and notice;[2] and, on the other hand, injury will be sufficiently proved when it appears that the guarantor was solvent at maturity, and became insolvent before demand was made or notice given.[3]

The guarantor may expressly waive notice of acceptance of the guaranty, and also demand and notice of default, in writing, on the face of the guaranty;[4] or he may waive it by a promise to pay after maturity, in like manner as an indorser.[5]

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[1] Dickerson v. Derrickson, 39 Ill. 577; Voltz v. Harris, 40 Ill. 155; Farmers' &c. Bank v. Kercheval, 2 Mich. 504; Rhett v. Poe, 2 How. (S. C.) 457; Fuller v. Scott, 8 Kan. 33.

[2] Reynolds v. Douglas, 12 Pet. 523; Wildes v. Savage, 1 Story, 22; Rhett v. Poe, 2 How. 457; Bashford v. Shaw, 4 Ohio St. 263; Hance v. Miller; 21 Ill. 636; Van Wart v. Woolley, 3 B. & C. 439.

[3] Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 534; Woodson v. Moody, 4 Humph. 303; Becker v. Saunders, 6 Ired. 380; Mayberry v. Boynton, 2 Harr. 24.

[4] Bickford v. Gibbs, 8 Cush. 154; Worcester Co. Inst. &c. v. Davis, 13 Gray, 531; Wadsworth v. Allen, 8 Grat. 174.

[5] Reynolds v. Douglas, 12 Pet. 523; Louisville Man. Co. v. Welsh, 10 How. 476; Sigourney v. Wetherell, 6 Metc. 563. See *ante*, §§ 1059 to 1168.

§ 1789. *As to what will discharge guarantor.*—The guarantor is discharged by a release of his principal as effectually as he would be by payment.[1] He is also discharged by any extension of time allowed the principal by the guarantee upon a consideration; by any renewal which suspends the original debt; and by a surrender of any security held by the creditor.[2] Otherwise the guarantor might be seriously damaged by the act of the guarantee. But taking security from the principal would not discharge him, unless there were some agreement to give him time, because that would strengthen, rather than weaken, his debt.[3] In short, a guarantor is a species of surety, and will be discharged by any act of the creditor that would discharge a surety.[4] A guaranty of the payment by another of goods to be sold not founded on any present consideration to the guarantor, and providing that it shall continue until written notice shall be given of its termination, is revoked by the death of the guarantor.[5]

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[1] Cowper v. Smith, 4 M. & W. 519.

[2] Sigourney v. Wetherell, 6 Metc. 553; Shook v. Shute, 9 Port. (Ala.) 113; Crosby v. Wyatt, 10 N. H. 318; Mayhew v. Crickett, 2 Swanst. 185; Hart v. Hudson, 6 Duer, 294; Howell v. Jones, 1 C. M. & R. 97.

[3] Sigourney v. Wetherell, 6 Metc. 553; Norton v. Eastman, 4 Greenl. 521.

[4] See *ante*, §§ 1308 *et seq.*, 1326 *et seq.*

[5] Jordan v. Dobbins, 122 Mass. 168.

CHAPTER LVI.

LETTERS OF CREDIT AND CIRCULAR NOTES.

SECTION I.

DEFINITION AND NATURE OF LETTERS OF CREDIT.

§ 1790. Letters of credit are instruments of frequent use in commerce, and while not possessing all the characteristics of negotiability which pertain to bills and notes, partake of them to such an extent as to be necessarily classed as negotiable instruments. A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit when it is addressed to all persons in general requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.

Sometimes the letter of credit is in the form of an authority to the corresponden to draw bills on the letter writer; and there are cases, as we shall see, in which it amounts to an actual acceptance by the letter writer of the bills when drawn.

In the Chapter on Guaranties[1] letters of credit have been incidentally treated where they partook of the nature of guaranties. But they are frequently direct and independent promises, and deserve more particular notice.

§ 1791. Mr. Bell, the learned commentator on the Laws of Scotland, whose language has been approvingly quoted

[1] See *ante*, Chapter LV.

by Judge Story in his treatise on Bills,[1] says: "Letters of credit, strictly speaking, are mandates, giving authority to the person addressed to pay money, or furnish goods, on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt, which arises on such a letter in its simplest form, when complied with, is between the mandatory and mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory: 1. Where the letter is purchased with money by the person wishing for the foreign credit; or, is granted in consequence of a check on his cash account; or, procured on the credit of securities lodged with the person who grants it; or, in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter against him to whom the money is paid. 2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is to see paid any advances made to him, or to guarantee any draft accepted, or bill discounted; and the compliance with the mandate in such case raises a debt both against the writer of the letter and against the person accredited."

§ 1792. Letters of credit have long been in use amongst merchants. Hallam, in his work on the Middle Ages, has observed that: "There were three species of paper credit in the dealings of merchants: 1. General letters of credit, not directed to any one, which are not uncommon in the Levant. 2. Orders to pay money to a particular person. 3. Bills of

[1] Story on Bills, § 463.

exchange regularly negotiable. Instances of the first are mentioned by Macpherson about 1200. The second species was introduced by the Jews about 1183."

§ 1793. Marius[1] gives a very full description of letters of credit. "Now," he says, "letters of credit, for the furnishing of moneys by exchange, are of two sorts, the one general, the other special. The general letter of credit is, when I write my open letter, directed to all merchants, and others, that shall furnish moneys unto such and such persons, upon this my letter of credit, wherein and whereby I do bind myself, that what moneys shall be by them delivered unto the party or parties therein mentioned, within such a time, at such and such rates (or, in general terms, at the price current), I do thereby bind myself for to be accountable and answerable for the same to be repaid according to the bill or bills of exchange, which, upon receipt of the money so furnished, shall be given or delivered for the same. And if any money be furnished upon such my general letter of credit, and bills of exchange therefore given, and charged, drawn, or directed to me, although, when the bills come to hand, and are presented to me, I should refuse to accept thereof, yet (according to the custom of merchants) I am bound and liable to the payment of those bills of exchange, by virtue and force of such my general letter of credit, because he or they which do furnish the money have not so much (if any) respect unto the sufficiency or ability of the party which doth take up the money as unto me, who have given my letter of credit for the same, and upon whose credit, merely, those moneys may be properly said to have been delivered. The special letter of credit is, when a merchant, at the request of any other man, doth write his open letter of credit, directed to his factor, agent, or correspondent, giving him order to furnish such or such a man, by name, with such or such a sum of money, at one or more times, and charge it to the account of the merchant that gives the letter of credit, and takes bills of exchange, or re-

[1] Marius on Bills, 36, 37; Story on Bills, § 460.

ceipts for the same." And again: "Now, in the general letter of credit, he that writes it doth make use of his credit for his own account and concernments in his way of trade; and therefore there need no more than his letter of credit to make him liable to repay what shall be so furnished. But in the particular letter of credit, he that writes the letter doth it not to make use of the moneys himself, or to be employed for his own use, but for the use and accommodation of some other man, at whose request he is willing and doth write his letter of credit; and therefore it is very expedient and ordinary for him at whose entreaty the letter is written at the writing and upon receipt thereof, to give security by bond, or otherwise, unto the merchant that gives the letter of credit, for repayment unto him, his executors, or assigns, of all such moneys as shall be received by virtue of the said letters of credit; for the merchant, by his letter, stands sufficiently bound to his correspondent; and therefore it is no more but reason that he for whom the letter is granted should give (as it were) his counter-bond for repayment. The bills of exchange, which are to be made for moneys taken up by letters of credit, do run in the ordinary form of bills of exchange."

§ 1794. Letters of credit, very much resemble bills of exchange in some particulars, but they are not bills; on the contrary they possess striking differences, although used frequently to avail the same general purposes. A person in New York having need of a certain amount in London, may purchase a bill on a London banker for that amount; and thus readily transfer his funds from the one place to the other. But he may not know to what extent he will need funds in London, and not desire to make an absolute transfer of all that he may possibly need to that point, nor to reduce what securities he may hold, into money. And then his convenience may be better suited by taking with him, or sending to London, a letter of credit to a house there, in which the letter drawer, who is duly authorized to do so, requests it to furnish the letter holder, or order, or bearer, whatever of money, or other thing, he may need to a certain amount.

The letter drawer may be only the agent of the letter drawee; or he may be a correspondent, or other person well known to it. He receives the consideration either in a deposit of funds, or securities from the letter bearer; and becomes the debtor of the letter drawee, who makes advancements upon faith of the letter, to their full extent.

Thus it becomes a constructive transfer of funds, without any actual transfer, like a bill of exchange. But it differs from a bill in several particulars: (1) It is not payable absolutely, but only in the event that the letter bearer may use it; which is optional with him. (2) It is not necessarily for a certain amount. (3) It is not necessary that it be addressed to a particular person. (4) The letter writer in many cases becomes the principal and only debtor for the advances, and is not in such cases at all like the drawer of a bill. And (5) he is never, like the drawer of a bill, entitled to immediate notice, if the letter is not complied with.

§ 1795. The liability of the letter drawer is not definite like that of the drawer of a bill; but each particular letter of credit is to be construed according to the particular language of the mandate. (1) Sometimes it is a direct order to advance money to a certain amount to the letter bearer, and an absolute undertaking to repay it. (2) Sometimes it promises to honor bills, drawn for any amount which may be advanced to the letter bearer. (3) And sometimes it undertakes that the letter drawer will become surety of the letter bearer to the extent of the amount advanced, or credit given him.

§ 1796. *Circular notes.*—There is a peculiar kind of letter of credit, called a circular note, which has recently come in vogue, and is thus described: "Circular notes, as they are called, are a still more recent invention, and are now used extensively both in this country and in Europe, but by travelers almost exclusively. They are generally, but not always, for specific sums, and are in fact letters of credit, which a banking house gives to a traveler, and which are made available, on

presentation to any of the agents or correspondents of the house, in a long list of places, the names, both of the places and of the agents in them, being usually stated in the instrument itself. A principal object of this is to enable a traveler to supply himself with funds frequently and at various points, and thus to prevent the necessity of carrying with him large sums of money, or depositing them at the principal centers of business along his route. They are usually transferable by indorsement, and are perhaps more like bills of exchange than ordinary letter of credit, but are not the same, nor would they be in all respects governed by the law of negotiable paper."[1]

SECTION II.

TO WHOM A LETTER OF CREDIT IS AVAILABLE, AND HOW FAR IT IS NEGOTIABLE.

§ 1797. There is no doubt that a special letter of credit is an available promise in favor of the person to whom it is specially addressed, whenever he makes the advance, or grants the credit which it requests.[2] Nor is there any doubt that if any one else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer; and he cannot, by thus thrusting himself forward, create any legal obligation on the part of the writer.[3] And, as we have already seen, it is equally well settled that if it contains a promise to honor bills, it is enforceable in the hands of any person taking them upon the faith of it, either as an actual acceptance, or as a promise to accept, as the case may be.[4] It was at one time questioned whether a general letter

[1] 2 Parsons N. & B. 109.

[2] Story on Bills, § 462.

[3] Robins v. Bingham, 4 Johns. 476; Walsh v. Bailie, 10 Johns. 180; Taylor v. Wilmore, 10 Ohio, 490; 2 Robinson's Prac. (new ed.) 284.

[4] See vol. 1, §§ 550 to 570. In Marchington v. Vernon, Guildhall, Trin. 27 Geo. III, B. R. (quoted in Story on Bills, § 462, note 1), which was assumpsit by the holder of a bill against the assignee of the drawee, who had given a promise to the drawer to honor the bill, Buller, J., said: "Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it."

of credit addressed to any person or persons, without any special designation, was available in the hands of any person making the advance, or granting the credit against the party signing it; or whether the remedy lay exclusively between the letter-writer, and the letter-bearer to whom it was given. But this, too, is now settled, and there is no doubt that as soon as any person accepts the proposition tendered at large, and on his so doing, a contract is at once completed between himself and the letter-writer, and it is the same in effect as if it had been specially addressed to him.[1] And this applies not only to cases where the letter purports on its face to be addressed generally to any person or persons whatsoever, who should make the advance, but also in cases where the letter of credit is addressed solely to the person to whom the advance is to be made, and merely states that the person signing the same will become his surety for a certain amount, without naming any person to whom he will become security, if it is obviously to be used to procure credit from some third person, and the advance is made by such person upon the faith of it.[2]

In a case before the United States Supreme Court,[3] the

[1] Lawrason v. Mason, 3 Cranch (S. C.), 492 (1806); Watson's Exr's v. McLaren, 19 Wend. 565; 26 Wend. 425; Birckhead v. Brown, 5 Hill, 642; Northumberland Bank v. Eyer, 58 Penn. St. 102, 103; Edwards on Bills, 239.

[2] Lawrason v. Mason, 3 Cranch, 492 (1806); Boyce v. Edwards, 4 Pet. 121; Adams v. Jones, 12 Pet. 207.

[3] Lawrason v. Mason, 3 Cranch, 492 (1806). In Russell v. Wiggin, 2 Story, 213, Messrs. Wiggin, of London, authorized parties in Boston, by a letter of credit, to draw bills on them in London for a certain amount, and promised to accept them. The payees, who had taken the bills in India on faith of the letters, sued the Messrs Wiggin. Story, J., said; "I have understood, and always supposed, that in the commercial world letters of credit of this character were treated as in the nature of negotiable instruments; and that the party giving such a letter, held himself out to all persons who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man ever is supposed to advance money upon such a letter of credit, upon the mere credit of the party to whom the letter is given; and I venture to affirm that no man ever took bills on the faith of such a letter without a distinct belief that the drawee

letter was as follows: "Alexandria, 28th November, 1800. Mr. James M'Pherson, Dear Sir: We will become your security for one hundred and thirty barrels of corn, payable in twelve months. (Signed) Lawrason & Smoat." It was held that the plaintiff, who had advanced the corn on the faith of the letter, could recover of the writers. Marshall, C. J., said: "There is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise, has a right of action."

§ 1798. The doctrine now established goes further than this, and asserts not only the inviolability of the promise contained in the letter of credit by any one acting on the faith of it, but real negotiability when it relates to bills of exchange. In an English case, it appeared that the A. & M. Bank gave to Dickson, Tatham & Co. a letter of credit, addressed to them, authorizing them to draw bills upon the bank to a certain amount, and that D., T. & Co. drew accordingly, and sold the bills to the Asiatic Banking Corporation. The A. & M. Bank having failed, the Asiatic Banking Corporation carried in a claim for the amount of them, under the winding up of the A. & M. Bank. The claim was resisted on the ground that D., T. & Co. were indebted to the A. & M. Bank in an amount exceeding the amount of the bills; and that the Asiatic Banking Corporation was only the equitable assignee of D., T. & Co., and were subject to any claim arising from the state of accounts between the bank and their assignors. But the lords justices, before whom the case was heard, held that persons taking the bills on the faith of the letter of credit were entitled to the absolute benefit of its

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was bound to him to accept the bills, when drawn, without any reference to any change of circumstances which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same, of which the holder, advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or, at best, a mere contingent security; and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole object for which letters of credit are given."

terms, and were not subject to any collateral or cross claims.[1]

§ 1799. *When letter of credit amounts to acceptance.*— Sometimes the letter of credit is in the form of an authority to a party or parties therein named to draw a bill of exchange on the letter writer; and its effect is frequently such as to amount to an actual acceptance of the bill drawn, according to its tenor, and to transmute the letter writer's liability from a mere promise contained in the letter to that of an actual party to the bill. In order for it to have this effect, it is necessary, (1) That the letter be written a reasonable time before the bill is drawn;[2] (2) That the contents of the letter should be communicated to the party who takes the bill, and that he should take the bill on the faith of the letter.[3]

When the letter designates a specific bill, which is drawn and taken in pursuance with its terms, the party taking it has his election to treat it either as an actual acceptance, or as a promise to accept, and accordingly to sue the letter writer as acceptor of the bill, or for breach of promise to accept.[4]

According to some authorities, the letter writer cannot be sued as acceptor (but only for breach of promise to accept), unless the letter designates the specific bill—puts its finger on the particular bill, so to speak;[5] but the better opinion, as it seems to us, is adopted by others, that whenever the bill corresponds with the authority under which it is drawn sufficiently to be identified, the letter writer may be sued as acceptor.[6]

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[1] Agra & Masterman's Bank, 2 Law Rep. Ch. App. 297 (1867); approved *In re* Blakely Co. 3 Law Rep. Ch. App. 154, and in Arents v. Commonwealth, 18 Grat. 769 (1868).

[2] See Chapter XIX, §§ 560 *et seq.* vol. 1. [3] Ibid.

[4] Russell v. Wiggin, 2 Story C. C. R. 213.

[5] Boyce v. Edwards, 4 Pet. 11; Coolidge v. Payson, 2 Wheat. 66; Schimmelpennick v. Bayard, 1 Pet. 264.

[6] See Chapter XIX, §§ 560, 561 *et seq.* vol. 1; Bissell v. Lewis, 4 Mich. 450; Nelson v. First N. Bank, 48 Ill. 39; Ulster Co. Bank v. McFarland, 5 Hill, 434; 3 Den. 553.

§ 1800. And here we conclude these Commentaries on the Law of Negotiable Instruments. Nice and refined in many of the distinctions necessary to be noticed, and strictly technical in many of its ramifications, the subject is nevertheless pervaded by a broad, and liberal, and catholic spirit, as engaging to the mind of the philosophical student of jurisprudence, as it is instructive and needful to the active practitioner of the profession. Fortunes, vaster in amount than the dowries of monarchs, are daily committed, in our commercial cities, to the keeping of those frail but precious fabrics known as negotiable papers. With good faith crowned as their patron goddess, and fortune as their ward, they attract to their consideration and protection, not only the hunters of wealth, but as well the good who cherish sentiments of integrity, and the learned and great who expound the principles by which it shall be jealously guarded and maintained.

Ever expanding to embrace new species of instruments within its scope of operation; ever increasing in consequence as commerce explores new fields of adventure, industry unlocks new mines of wealth, and capital seeks new subjects of investment, the law of negotiability is destined to rise into an importance of which its early history gave little promise, and which its present development falls far short of realizing.

In no other branch of jurisprudence have the laws of different nations and different States so closely assimilated to each other. It is the pioneer in producing a homogeneous code, which shall prevail throughout the realm of commerce, without regard to the limits of country, race or language. It is continuously struggling to eradicate local partialities, and prejudices, and temporary expediences, and to attain that which shall remain stable, because founded on principles of universal justice. It was in maintaining the validity, and enforcing the obligation of a negotiable instrument that the United States Supreme Court said: "We will never immolate truth, justice and the law, because a State tribunal

has erected the altar and decreed the sacrifice."[1] And for the facilitation of trade, and the fair understanding of mercantile negotiations among all mercantile men, it is to be hoped that the day is not far distant, when it may be truly said (in the language of Cicero, approvingly quoted by Mansfield and Story), respecting the law of our subject, wherever industry turns a wheel or commerce sets a sail: "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

[1] *Ante*, Vol. I, § 10, p. 10, note 1.

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INDEX TO VOLUMES I. AND II.

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